In the United States Court of Appeals for the Ninth Circuit

No. 21183

SOUTHWESTERN CABLE CO., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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CONTENTS

236-331 O—66——1

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RESPONDENTS' APPENDIX

APPENDIX A

TICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

DOCKET NO. 15971, 1 F.C.C. 2D 453

(3)

NOTICE OF INQUIRY AND PROPOSED RULEMAKING RE ALL CATV SYSTEMS, Do
No. 15971:

Requests that the Commission assert jurisdiction of TV signals by CA
and promulgate rules and regulations governing such distribution; gra
in part.

Inquiry and rulemaking directed toward all CATV systems; institute

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 21, 74 (PROPOSED SUBPART J), AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS	Docket No. 15 (RM Nos. 636, 742, 755, and 76

NOTICE OF INQUIRY
and
NOTICE OF PROPOSED RULEMAKING

(Adopted April 22, 1965)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER C
CURRING IN PART AND DISSENTING IN PART AND ISSUING STATEME

1. Notice is hereby given of inquiry and proposed rulemaking in above-entitled matter.

2. The Commission has received a number of requests that it as jurisdiction over the distribution of television broadcast signals community antenna television systems (CATV's) and promulg rules and regulations governing such distribution. Many of t requests were made informally in comments on the rulemaking dockets Nos. 14895 and 15233 with respect to the licensing of microw facilities used to relay television signals to CATV systems.[1] In a tion, five formal petitions have been filed.[2]

3. (*a*) On October 16, 1964, the American Broadcasting Co. (A filed a "petition for Commission regulation of the carriage of t vision signals by Community Antenna Television Systems," requ ing the Commission to promulgate rules establishing areas zones to be served by television stations and limiting the use of

[1] The following specifically requested that the Commission assume jurisdiction ove CATV's: Aroostook Broadcasting Corp., Association for Competitive Television, Cha Seven, Inc., and WLUC–TV. Other parties filing comments indicated that they held same views.

[2] Similar petitions have also been received from Capital Cities Broadcasting C (RM–755, filed on Apr. 7, 1965) and Taft Broadcasting Co. (RM–766, filed on Apr 1965). Any further petitions of this nature will be placed in this docket and treate comments.

ions' signals beyond such areas and zones (RM No. 672). Var- pleadings in support of, or opposition to, the ABC petition have n submitted, and ABC has filed a reply; (*b*) on December 18, 4, Springfield Television Broadcasting Corp. (Springfield), filed equest for declaratory ruling" that all CATV systems, whether izing microwave facilities or acquiring television signals off-the- are subject to the Commission's jurisdiction and required to ply with operating provisions similar to those proposed in kets Nos. 14895 and 15233; (*c*) on January 22, 1965, Boise Valley adcasters, Inc., licensee of station KBOI-TV, Boise, Idaho oise), filed a "petition for interim relief," requesting the Com- sion to assume complete jurisdiction over all CATV systems and ose a "freeze" on all microwave applications for CATV use ding the promulgation of rules governing all CATV systems; on February 12, 1965, Westinghouse Broadcasting Co., Inc., l a "petition for consolidation of proceedings and assertion of isdiction over Community Antenna Television Systems," request- the Commission to institute rulemaking governing all CATV tems, consolidate that proceeding with dockets Nos. 14895 and 33, and stay immediately operations by CATV's in those areas ich now or in the near future will be served by three commercial vision stations pending the adoption of final regulations; (*e*) March 10, 1965, the Association of Maximum Service Telecasters, . (MST), filed a "petition of Association of Maximum Service ecasters, Inc., for rulemaking" (RM-742), calling for the im- diate exercise of regulatory authority by the Commission over CATV systems and the adoption of comprehensive rules of gen- l applicability.[2a] The stated bases of the five petitions are sum- rized below.

4. (*a*) *The ABC petition.*—ABC petitions the Commission to ulate the distribution of television signals by CATV systems on ground that such action is essential to our ability to discharge tutory responsibilities and within the Commission's present au- rity. ABC urges that the present and likely future trend of TV development threatens to undercut the discharge of our statu- y responsibilities "to make available, so far as possible, to all the ple of the United States a rapid, efficient, nationwide, and world- le wire and radio communication service" (sec. 1 of the Communi- ions Act, 47 U.S.C. 151), equitably apportioned "among the eral States and communities" (sec. 307(b), 47 U.S.C. 307(b)).

5. In support of the claim of increasing CATV impact upon Com- ssion and statutory policies, ABC points to major changes in CATV erations since the Commission's 1959 report and order in docket No. 443, "In the Matter of an Inquiry into the Impact of Community ntenna Systems, TV Translators, TV 'Satellite' Stations, and TV epeaters' on the Orderly Development of Television Broadcasting," F.C.C. 403, 18 Pike & Fischer, R.R. 1573. According to ABC, the mber of CATV systems has grown from approximately 550, serving estimated 1,500,000 viewers, to approximately 1,300 CATV systems

[2a] Thirteen dissenting members of AMST have filed comments expressing a contrary ltion.

serving over 4 million viewers. Moreover, CATV franchises, sought or granted, have been running at the rate of one a day during the last 10 months, in 345 communities in 40 States. Whereas the number of channels offered to CATV subscribers was typically three in 1959, the emphasis now is on broadband systems with a capacity for 11 or 12 channels. In 1959, CATV operations were largely confined to small, or fairly small markets; today there are plans to extend New York City stations to substantial communities many miles away in upstate New York and Pennsylvania. Predicting that the next step will be for CATV to bring New York City independent stations into major cities like Boston, Philadelphia, Baltimore, and Washington, ABC expresses fear that this might lead to combined CATV and pay-TV operations which would siphon off top attractions from free TV.

6. Before summarizing the further bases for ABC's claim of adverse impact, we note in this connection that two UHF permittees in Philadelphia have expressed concern over the effect of pending CATV applications for franchises in that city. William Fox, permittee of a new UHF station, WIBF–TV, which expects to commence operations in Philadelphia in mid-1965, filed a statement supporting the ABC petition and commented inter alia as follows:

> As set forth in the ABC petition, there are now several applications pending for CATV franchises in Philadelphia. The successful operation of UHF station WIBF–TV in Philadelphia, which now has three operating VHF stations, will be dependent on its ability to bring outstanding programing not now available to the Philadelphia audience and on adequate protection of this programing from uncontrolled carriage of signals from other markets by CATV systems serving Philadelphia. Unregulated carriage of television signals by CATV systems in Philadelphia will prevent implementation of the Commission's basic television allocation policy which looks toward the operation of UHF and VHF stations in intermixed markets throughout the United States.

In addition, ABC points out that the permittee of UHF station WPHL–TV, which has suspended operation in Philadelphia but plans to go back on the air in mid-1965, wrote a syndicated film supplier on December 10, 1964, as follows:

> As you may know, a great deal of CATV activity has emerged in Philadelphia and vicinity. Rollins Broadcasting has just been granted an exclusive franchise for Wilmington, Del. Jerrold Electronics has applied for Camden, N.J.; and more than a half dozen applicants are seeking franchises for Philadelphia, including Triangle, Storer, the Bulletin Co., etc. All proposed systems would be operating within our principal coverage area. Their main offering is to be the programing of WNEW–TV, WOR–TV, and WPIX. The New York indies may represent damaging competition to Philadelphia UHF stations should their programing be admitted to this market. We, therefore, must ask that any film purchase permit WPHL–TV option for cancellation, without penalty, in the event the same film shows are available from New York indies via local cable systems. I am sure you will understand that this measure is a necessity.

7. The ABC petition notes further that the enactment of the all-channel receiver law in 1962 (76 Stat. 150, 151) has committed Congress and the Commission to a long-range television plan in which the expanded use of UHF will be paramount, and asserts that unregulated CATV poses a substantial threat to UHF development. By way of example, ABC notes that a Binghamton, N.Y., UHF station, in oper-

ion since 1957, has recently advised the Commission that UHF rvice would terminate there (leaving the city with one VHF station place of one VHF and two UHF) if CATV were permitted to bring four New York City independent stations. ABC also points to ap- ications for CATV franchises in a number of Connecticut towns here UHF channels are either in use or allocated, noting that the ATV's propose to bring in New York City stations as well as hers. ABC further lists 70 communities with UHF allocations where ATV franchises were sought between August 21 and November 26, 64, and 95 communities with UHF allocations where CATV fran- ises were granted during the same period.

8. In addition to the impact on UHF, ABC urges that unregulated ATV has had, and will have, substantial adverse effect on service by cal television stations, since the splitting of audience resulting from multiplicity of additional signals brought in by CATV inevitably uses the station to lose audience and advertising revenues. ABC aims that the rulemaking in dockets Nos. 14895 and 15233 is wholly adequate to insure that local television service can survive effectively, id that CATV cannot be an adequate substitute for local television oadcast service for three reasons: "First, CATV systems do not serve e public living in the sparsely populated areas that, because of low- opulation density, are considered uneconomical for cable systems to ach; second, CATV systems do not serve those who, though within e wired-up areas, cannot afford the subscription fee; and third, ATV systems do not provide the benefits of a locally originated tele- sion service, available to all without a charge, benefits which are portant to the continued welfare of our political, economic, and cial systems."

9. In sum, ABC states, the present and prospective trend of CATV owth poses a threat to the kind of local television service now en- yed by a great many communities throughout the country and fos- red by the Commission for many years. It asserts that if CATV ystems of the type now being proposed in many major markets of the untry come into being, carrying a dozen or more channels, the ability stations now serving these markets to provide local service will be bstantially impaired and UHF stations scheduled to go on the air these markets may never get off the ground." Fundamentally at ake, according to ABC, is the question of whether CATV is to be ermitted to rework the basic framework of the established broad- asting system from a multiplicity of local stations into a nationwide istribution of signals from major metropolitan centers like New ork, Chicago, and Los Angeles. If this were to become the objective national communications policy, contrary to longstanding Com- ission and congressional views as to the public interest, more efficient nd satisfactory means than CATV distribution could be devised, such s space satellites.[3]

[3] ABC points out that the National Association of Broadcasters expressed a similar ncern about the trend of CATV in its comments in docket Nos. 14895 and 15233 as llows:

"If multiple-signal choices were to be the prime objective of communications policy the United States, as developed by Congress and the Commission, it would have been a ther simple matter to provide for satellites scattered throughout the country, inter- nnected with New York and Los Angeles. By this means, every community would

10. While taking the position that the Commission's general pow s under the Communications Act include authority to prevent pers s other than licensees from causing an undue burden on interst e commerce in conflict with the basic purpose of the act and the sponsibilities of the Commission,[4] ABC invokes particularly the s cific authority conferred by section 303(h) to "establish areas or zo s to be served by any station" (47 U.S.C. 303(h)). It requests the Co mission to propose and adopt rules which would define the areas a zones normally to be served by television stations and prohibit the of the stations' signals to serve other areas except upon prior cons t of the Commission or in accordance with established regulations fining the basis upon which the signal could be extended beyond normal service area of the station.[5] ABC urges that the power determine the areas or zones to be served by any station necessar includes the correlative power to make these determinations effect against nonlicensees pursuant to the provisions of sections 4(i), 303(312(b), and 502 of the Communications Act. It notes that th sections do not in terms restrict the Commission's authority to t imposition of limitations on licensees themselves, and that expli authority to deal with specific practices is not required. *Nation Broadcasting Company* v. *United States*, 319 U.S. 190, 218–21; *American Trucking Association* v. *United States*, 344 U.S. 298, 30 312; *Federal Communications Commission* v. *Pottsville Broadcasti Co.*, 309 U.S. 134, 138; *United States* v. *Pennsylvania R. Co.*, 323 U 612. And, finally, ABC requests the Commission to exercise t authority promptly to prevent imminent frustration of the develo ment and growth of local services through the uncontrolled use station signals by CATV systems.

11. (*b*) *The Springfield request for declaratory ruling.*—Sprin field, the licensee of UHF station WRLP (channel 32) in Greenfie Mass.,[6] requests a declaratory ruling that all CATV systems are su ject to the Commission's jurisdiction on the ground that there is immediate and urgent need for the Commission not only to assert jur diction over all CATV systems but also to provide provisional rel from unfair and prejudicial competition to local stations by off-the-

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receive several television signals. But the Congress and the Commission have decl otherwise; that a paramount objective of television broadcasting is to provide each c munity with at least one local facility.

"If the microwave complex is permitted to relay signals over long distances, an vertiser will soon find that he can secure wide coverage simply by buying a few stati in large metropolitan areas. Nonduplication prohibitions would not remedy this con tion. This proliferation of distant signals will result in curtailed buying of local mark by advertisers, which in turn will soon exert economic pressure on countless local outl with a corresponding depressing influence upon the ability to program locally.

"Accordingly, we submit that the Commission should extend its consideration of mic wave applications to include factors beyond simple nonduplication restrictions. It sho examine and evaluate the effect the extension of a station's signal far beyond its designa service area would have on overall allocation policies."

[4] ABC notes that the National Community Television Association has taken the posit before the Connecticut Public Utilities Commission that "a community antenna televis system is directly concerned with television broadcasting" and that "the matter of p tection of local television stations" lies in a "sensitive area of regulation which t Federal Government has wholly preempted."

[5] ABC also requests the Commission to issue a policy statement to the effect that lo television broadcasters should be preferred in the issuance of CATV franchises in th communities.

[6] Springfield is also the licensee of UHF stations in Springfield and Worcester, Mas and the permittee of a UHF facility in Dayton, Ohio. Previously, on July 28, 19 Springfield filed a petition for rulemaking (RM–636), to establish technical standards CATV operations. This petition, and comments already received, will be placed in t docket for further comment.

TV systems. Using its own situation as an example, Springfield es that the number of CATV systems in competition with WRLP grown from 9 in 1957 to over 20 at present. These CATV systems ng into the WRLP service area television signals from such distant s as Albany, Schenectady, Utica, and New York, N.Y.; Poland ing, Maine; Manchester and Durham, N.H.; Boston, Mass.; and v Haven and Hartford, Conn. Since only one of the CATV sys- s uses microwave, the rulemaking in dockets Nos. 14895 and 15233 afford WRLP little relief. Springfield has been unable to reach satisfactory arrangement with the off-the-air CATV's concerning carriage and nonduplication of the WRLP signal, and, because declining revenues, has been forced to discontinue local program gination on WRLP.

2. Springfield predicates Commission jurisdiction on the theory CATV systems, in receiving and distributing television signals vire to the public, are engaged in interstate communication by wire in the purview of sections 2(a) and 3(a) of the Communications . Section 2(a) states that the provisions of the act "apply to all rstate and foreign communication by wire or radio," and section) defines "communication by wire" as the "transmission of writing, s, signals, pictures, and sounds of all kinds by aid of wire, cable, other like connection between the points of origin and reception such transmission, including all instrumentalities, facilities, ap- atus, and services (among other things, the receipt, forwarding, delivery of communications) incidental to such transmission." ingfield asserts that CATV systems are an integral part or con- ing link in the dissemination of television signals between the ginating facility and the viewing public, and hence are incidental nterstate transmission. For, while the CATV systems themselves usually located within one community within one State, it is estab- ed that the television signals intermediately received, forwarded, delivered by the CATV are interstate commerce.

3. Like ABC, Springfield finds ample basis for Commission juris- ion over all CATV systems in sections 4(i), 303, and 307(b) of Communications Act and the principles laid down in cases such *National Broadcasting*, *American Trucking*, and *Pennsylvania R.* in upholding a regulatory agency's use of the broad powers con- ed in its enabling statute to protect the integrity of the regula- scheme.[7] It requests the Commission to issue a declaratory ng that all CATV systems are subject to the Commission's juris- ion and to impose interim operating provisions similar to those pted in dockets Nos. 14895 and 15233. Springfield claims that mpt action is essential to the success of the all-channel law and anded use of UHF in small and medium size markets, as the id expansion of unregulated off-the-air CATV systems is inhibit- investor interest in UHF television and may permanently stunt growth of UHF. Asserting further that relief accorded only r lengthy proceedings would come too late, Springfield states that

[7] Springfield also cites *Federal Communications Commission* v. *Pottsville Broadcasting* 309 U.S. 134; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177; *Houston, East and West s Railway Co.* v. *United States*, 234 U.S. 342.

interim provisions are required during the pendency of final r
making and, being "procedural" in nature, could be imposed s
marily.

14. (*e*) *The Boise petition for interim relief.*—Boise, the licen
of station KBOI–TV in Boise, Idaho, states that it has also file
petition to deny pending applications for microwave facilities wh
would relay signals of four stations in Salt Lake City, Utah (appro
mately 250 miles from Boise), to CATV systems in two communi
within KBOI–TV's grade A contour. Conceding that the rem
there requested would be adequate for its own immediate purp
Boise says that concern over the broader interests of the public
compelled it also to file the instant petition affirmatively support
ABC's request and presenting additional considerations.

15. Boise states that by allowing CATV to operate uncontrol
the Commission is, to a considerable extent, abdicating its respon
bilities under section 315 (political broadcasts), 317 (sponsors
identification), and 310 (citizen control requirements) of the Co
munications Act, as well as under its own "fairness doctrine" (c
troversial issues), enunciated in "Report on Editorializing by Bro
cast Licensees," docket No. 8516, 13 FCC 1246, and policies agai
undue concentration of control of communications media (multi
ownership rules). It urges that these provisions were enacted by C
gress or promulgated by the Commission to ensure that the pul
receives an equal presentation by legally qualified candidates for p
lic office and a fair presentation of controversial issues, is advised
the origin of advertising claims, and is secure in the knowledge t
the material it receives has been distributed over facilities control
and operated by U.S. citizens, with diversification of ownership. T
intent of Congress to protect the viewing public in these respects
tends to all viewers, and it "is unrealistic to overlook the fact th
through the community systems" the subscribing members of
public "are receiving and are, in a sense, being served by the progra
of the originating station." *Clarksburg Publishing Co.* v. *Fede
Communications Commission*, 255 F. 2d 511, 517 (C.A.D.C.). CA
operators determine what their subscribers shall view, and being f
of all regulation, need not be citizens, can achieve unlimited conc
tration of control, may censor, advertise without sponsorship ide
fication, and ignore the "fairness doctrine" and equal-time requi
ments for political broadcasts.

16. Boise accordingly urges that Commission jurisdiction over
CATV is necessary to achieve the purposes of sections 310, 315, a
317 of the Communications Act, as well as to effectuate the Comm
sion's fairness and diversification policies, and can validly be asser
under the doctrine of *American Trucking Association* v. *United Stat
344 U.S. 298. Alternatively, in the event that the Commission deci
against asserting jurisdiction on the basis of its present authori
Boise seeks the imposition of a freeze on all microwave grants
CATV use, or at least those which would extend station signals m
than 100 miles from the transmitter, to protect the integrity of t
table of assignments pending the enactment of legislation in this fi
and the finalization of administrative rules. It further suggests th

translator stations and CATV systems should be accorded like treatment by the Commission, i.e., that translators should not be barred from obtaining microwave facilities if they are made available for CATV use and that the rebroadcast permission required for translators under section 325(a) of the Communications Act should similarly apply to CATV operations.

17. (*d*) *The Westinghouse petition.*—Westinghouse [8] petitions the Commission to exercise plenary jurisdiction over all CATV systems, institute a new factfinding and rulemaking proceeding directed to all phases of CATV concern, and consolidate the proceedings in dockets Nos. 14895 and 15233, docket No. 15415 (with respect to CATV ownership by broadcast licensees), and RM 672 (the ABC petition).[9] Specifically, Westinghouse recommends that CATV be limited to those areas outside the overlapping grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station.

18. Taking the position that CATV in its original role as an extension of service to inadequately served areas is a necessary and desirable adjunct of television broadcasting, Westinghouse states that the principal cause for alarm today is the altered direction of present CATV growth into larger and larger markets—many with three or more existing stations. It points, inter alia, to the six pending applications for CATV franchises in Philadelphia (noting that one of the applicants has announced his intention to spend approximately $40 million on the development of a Philadelphia system); to the contract signed by Mohawk Valley Community Antenna for installation of a CATV system with 60,000 possible connections; and to the award of a CATV franchise for the suburban Philadelphia community of Upper Darby which is intended to be "the nucleus of CATV systems to serve many additional areas in the Delaware Valley." Westinghouse predicts that within the next 3 months applications for CATV franchises will be filed in every major city of the country, and that the final step in the development of CATV will be a national CATV "network" making all the channels of New York, Los Angeles, and perhaps other major cities available from coast to coast.

19. In the view of Westinghouse, the rapid and unregulated growth of CATV in this direction endangers the Commission's blueprint for television service, as set forth in the sixth report and order, and will frustrate Commission policy with regard to UHF. It has been established, Westinghouse claims, that UHF stations have a much better chance of success in the major metropolitan areas where the oppor-

[8] Westinghouse bases its interest in this matter on its position as a licensee of television stations in Boston, Baltimore, Pittsburgh, Cleveland, and San Francisco, and on the fact that a CATV microwave common carrier and four CATV systems are owned by its parent corporation, Westinghouse Electric Corp. Westinghouse also asserts an interest on the basis of its status as an independent program producer and distributor.

[9] A "motion in support of petition for consolidation of proceedings and in opposition to assertion of jurisdiction over Community Antenna Television Systems," filed by National Community Television Association Inc., on Feb. 19, 1965, apparently also seeks consolidation of docket No. 15586.

tunity for broad advertising support exists. Because of the all-char
receiver legislation, the growth of UHF might be stabilized by
promise of steadily increasing audiences but for investor uncertai
about the trend of CATV. Westinghouse states that if allowed
restricted growth, CATV will almost certainly impede the devel
ment of new stations in markets otherwise capable of supporting th

20. Westinghouse further states that CATV entry into the lar
markets will undoubtedly have an adverse effect upon much of
independent programing now presented by stations in those mark
and on Westinghouse's own activities as an independent progr
source. In keeping with the Commission's policy of fostering divers
of programing sources, Westinghouse has actively endeavored to
velop independent programing, such as the "PM East and PM We
series, the "Mike Douglas" show, "The Steve Allen Show," the "C
War" series, and "That Regis Philbin Show." If programs such
these, which ordinarily would be sold to many independent stati
across the Nation, are carried by CATV into their markets, many
these stations would be unwilling to purchase the programs. Th
Westinghouse's economic base, upon which such substantial progra
ing efforts necessarily depend, would gradually be destroyed by
ability to make sufficient sales. Assuming a 5-year growth of CA
systems in the East on the scale established during the last 2 ye
Westinghouse states that the cumulative adverse effect on independ
programing sources in the larger markets would indeed be serious.

21. Westinghouse contends that its proposal for barring CA
from areas which now or in the near future will be served by th
commercial stations, would further the public interest and effec
reasonable accommodation of the conflicting interests of the televisi
broadcast and CATV industries, in harmony with the Commissio
policy on the development of stations. It urges that the millions
Americans throughout the United States living in areas not serv
by three or more television signals, and therefore unable to rece
the major programing services, should not be compelled to wait
definitely for service. CATV can fill the television needs of su
areas today, and should be allowed to do so, since the larger, m
densely populated areas offer more promise for new UHF stations
the near future than low-density areas. While CATV would probal
have some adverse economic impact on existing stations, this imp
is offset in one- and two-station markets by the susbtantial benc
accruing to the public in the additional program choices provided
CATV.[10] No corresponding benefit can be demonstrated in three
more station markets, where the contribution of CATV is minim
In such markets, CATV can offer the viewing public little more th
a duplication of programing which either has been or soon will
available via the local stations. Moreover, the possible loss to t
public is much greater because of the eroding effect CATV would ha
on the sources of independent programing. Accordingly, Westin
house believes that barring CATV from such areas while permitti

[10] Westinghouse would make an exception for two-station markets where a construct
permit for a third station has been granted, permitting CATV only in the event the th
station was not on the air after a reasonable period, like 6 months.

to serve all areas not adequately receiving the three major program-
sources would provide a tremendous benefit in terms of increased
vice to millions of Americans, while maintaining CATV in its tra-
ional position as a fill-in service complementary to television
adcasting.

2. Westinghouse strongly urges that it is imperative for the Com-
ssion to stay immediately the commencement of operations by
TV's in those areas which now or in the near future will be served
three or more commercial stations pending the adoption of final
ulations to this effect. It states that once CATV franchises are
nted in the larger markets and construction is commenced pursuant
hose grants, the Commission will in fact have lost effective control
television allocations in those areas. Should even a small part of
ambitious $40,000,000 Philadelphia CATV plan be consummated,
practical and legal difficulties which the Commission would en-
nter in attempting to reverse the situation would be virtually in-
mountable. Moreover, prompt Commission action is asserted to be
ential to remove the uncertainty as to the future role of CATV
ich is discouraging investment in new UHF facilities. Westing-
use states that if the Commission fails to act within the reasonably
ir future, Westinghouse will be obliged to file "protective" applica-
ns for CATV franchises in those cities it now serves through tele-
ion broadcasting when applications are filed by others, even though
agreeing in principle that these adequately served markets should
open to CATV.

3. (*e*) *The MST petition for rulemaking.*—The MST petition for
nprehensive rulemaking governing all CATV systems renews, with
ne amplification, the jurisdictional arguments made by the other
titioners. In support of its request for prompt rulemaking action
d a stay of microwave grants pending the adoption of rules, MST
ges that "CATV's rapidly accelerating movement away from its
storic and proper role as an auxiliary, 'fill-in' service bringing tele-
ion to areas unable to receive off-the-air broadcast service poses a
ave threat to the growth of commercial and educational UHF tele-
ion, to the integrity of the nationwide system of television alloca-
ns, and to the continuation, improvement, and expansion of free,
mpetitive, local, and area television broadcasting generally." MST
tes that regulation of microwave CATV only, and the imposition
carriage and nonduplication requirements alone, would be insuffi-
nt to avert the threat. It asserts that the present trend of CATV
velopment, *if* unchecked and inadequately regulated, would disrupt
e growth of UHF television and frustrate the goals of the all-channel
ceiver legislation; could lead to the destruction of the system of
evision allocation through fractionalization, blacking out, or im-
iring local and area broadcasting service; and might prove to be
e means of a gradual transition from advertiser-supported free tele-
ion to pay TV. MST urges that CATV must be confined to its
oper role as an auxiliary "fill-in" service, bringing television service
to areas which cannot be expected to receive off-the-air broadcast
rvice now or in the near future; for, CATV can appropriately sup-
ement, but must not supplant, television broadcast service.

24. Accordingly, MST requests the Commission to assert jurisdiction over *all* CATV systems without further delay, pursuant to existing authority, and to proceed expeditiously towards the adoption of rules which would achieve adequate regulation, since the "longer action is delayed, the more serious the impact of CATV, the more uncertain the rules of the game, and the less effective the action." Pending the adoption of rules, MST seeks a stay on microwave grants for CATV use. It states: "Such a stay is warranted here because of the scope of the problem, because conditions are changing at a rapid pace, and because there are now *no* Commission rules dealing in any way with CATV except as to limited technical matters. Additionally, the Commission should put on notice all persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation and that some CATV systems may be required to modify or cut back their operations."

25. Specifically, MST requests the Commission to initiate rulemaking of general applicability which would—

> (1) Provide appropriate standards to govern the technical quality of signals distributed by CATV;
>
> (2) Prevent CATV from duplicating within a specified period, the programing of television broadcast stations which serve, or which normally would be expected to serve, the community in question, and establish program classifications to determine the circumstances under which CATV will not duplicate the programing of a station;
>
> (3) Subject to nonduplication requirements, require the CATV system to carry the signal of any station within the grade B or better contour in which the community served by the CATV is located;
>
> (4) Permit a signal to be carried by CATV only if the community is located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station, or is consistent with a standard combining both distance and signal contours;[11]
>
> (5) Limit, with respect to television and visual material generally, CATV systems to reception and simultaneous retransmission of broadcast signals without insertions or deletions;
>
> (6) Require the filing of full information with respect to ownership interests in, direct and indirect control of, and officerships and directorships in CATV facilities.

Discussion

26. The above-described petitions raise substantial questions of fundamental importance to the Commission's responsibilities under the Communications Act. We discuss in part I below the requests for Commission action to extend the requirements of dockets Nos. 14895 and 15233 to all CATV systems, and in part II the additional questions presented by petitioners' requests for other measures.

PART I

27. Insofar as petitioners urge that the rules governing CATV systems using microwave should extend to all CATV systems, we are in agreement. It has already been determined in the report and order in dockets Nos. 14895 and 15233 that CATV systems should carry local

[11] In a policy statement submitted to the Commission, MST suggested the grade B contour of the station carried, or a distance of 80–90 miles.

tations without duplication. The considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service, apply equally to all CATV systems and need no elaboration here. The main questions are therefore (1) whether the Commission can appropriately proceed on the basis of its present statutory authority, and (2) whether there are any special problems of substance or procedures inherent in an extension of the carriage and nonduplication requirements to nonmicrowave, or so-called off-the-air CATV systems.

28. The Commission's jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion. We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting.[12] Moreover, we have previously taken the position that clarifying legislation would be appropriate, even assuming present jurisdiction, and have recommended such legislation to Congress. While the 86th Congress gave extensive consideration to some of the various proposals submitted by the Commission and others, no legislation was enacted and bills introduced in subsequent Congresses received no action.[13] However, neither the Commission's prior pronouncements nor the failure of Congress to act favorably on clarifying proposals is determinative of the legal question of the Commission's jurisdiction and authority over off-the-air CATV systems under the existing provisions of the Communications Act. *Helvering* v. *Clifford*, 309 U.S. 311, 337–338; *United States* v. *Price*, 361 U.S. 304, 310–313; *American Trucking Assoc.* v. *United States*, 344 U.S. 298, 314; *Carter Mountain Transmission Corp.* v. *F.C.C.*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963).

29. Petitioners have made a strong case in support of present jurisdiction. We have carefully reexamined the pertinent provisions of the Communications Act in light of their arguments and the authorities cited. Upon such reconsideration, we conclude, for the reasons set forth in the attached memorandum as to jurisdiction, that CATV systems are engaged in interstate communication by wire to which the

[12] See *Frontier Broadcasting Co.* v. *Collier*, 16 Pike & Fischer, R.R. 1005; *Report and Order in Docket No. 12443*, 26 F.C.C. 403; *Distribution of Television Programs by CATV Systems*, FCC 62–871.

[13] Following the report and order in docket No. 12443, supra, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801, and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741, and S. 1886. On Sept. S. 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86 Cong., 1st Sess. In 1960, following 2 days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407, and 10520), S. 2653 was recommitted to the Committee on Interstate and Foreign Commerce by one vote. 106 Cong. Rec. 10547. As a result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044, and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.

provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It would further appear that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave.[14]

30. For the reasons set forth in the report and order in dockets Nos. 14895 and 15233, it is desirable to extend the requirements there adopted to all CATV systems. We have accordingly decided to institute rulemaking to that effect. Although no specific rules are appended, it is proposed to make the substantive provisions of the rules adopted in dockets Nos. 14895 and 15233 applicable to all CATV systems. We repeat that two particular issues are raised—(*i*) the Commission's authority to promulgate such rules and (*ii*) the problem of substance or procedure posed by rules going to nonmicrowave CATV systems. In the latter respect we also point out that we shall take into account the experience gained, or additional information received, as a result of interim operation under the revised provisions adopted in dockets Nos. 14895 and 15233, prior to their becoming generally applicable. In this way, we shall be in a position (assuming favorable resolution of the jurisdictional issue) to promulgate rules affecting all CATV systems and fully and fairly implementing the public interest both with respect to establishment and maintenance of local broadcast service and the provision of multiple television services. See paragraph 6, FCC 65–335, issued this day.[15]

31. Other matters should be pointed up. While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford the interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (*i*) a congressional guidance as to policy and (*ii*) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (*1*) Congress has enacted legislation in this field which does not preclude the Commission from

[14] In initially reaching this conclusion, we have considered the various comments submitted in opposition to the ABC and other petitions.

[15] Since there has been extensive examination of the matters in dockets Nos. 14895 and 15233, a shorter time for filing comments and reply comments on part I will therefore be scheduled. We are unable to agree with Springfield's contention that immediate relief is procedural in nature or to conclude that summary procedures would be proper.

promulating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

32. Third, in the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no Federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities and State regulatory commissions to the maximum extent possible, such as by making information available to them, consulting with respect to technical standards for CATV operations, etc.

33. Fourth, in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (report and order in dockets Nos. 14895 and 15233, par. 143). However, we were unable to determine without further information whether this exception should apply across the board or whether the CATV system should be required to make a showing that a certain number or percentage of its subscribers possess color receiving sets before color duplication would be permitted. Accordingly, comments are requested as to whether the rules should require a threshold showing by the CATV and, if so, what kind of showing would be appropriate. Whether or not the Commission adopts rules going to all CATV systems, the comments received will, in any event, be applicable to microwave CATV systems.

34. We will consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave CATV systems with limited channel capacity. It is contemplated that a questionnaire will be mailed to every known CATV operator in the near future seeking specific information to assist in making this determination (see FCC 65–335, par. 161). In the event that any CATV operator is inadvertently omitted from such distribution, a copy of the questionnaire will be supplied upon request to the Commission.

35. The proceedings in dockets Nos. 14895 and 15233 were primarily concerned with commercial rather than educational television stations (ETV). While the carriage requirements were made applicable to

educational stations, the nonduplication provisions were not, sinc many of the pertinent considerations are obviously not present in th case of ETV. We recognize, however, that the carriage requirement alone may not be sufficient to promote the sound growth of loca educational stations. Accordingly, information is requested in thi proceeding as to the nature of any further problems of ETV arisin from CATV operations and what Commission action might b appropriate.

36. We are also interested in such questions as whether the carriag and nonduplication requirements should be extended to protect statio owned translators, which are located outside the station's predicte grade B contour, so as to encourage these off-the-air facilities. I protection were to be accorded such translator facilities, should th rules be along the lines of those adopted for local stations, or woul different provisions be more apropriate? Conversely, some of th comments in dockets Nos. 14895 and 15233 suggested that statio owned translators should be precluded from duplicating the progra of local stations. Interested persons are invited to address themselv in this proceeding to the question of whether there is a proble warranting action.[16]

PART II

37. The petitions also raise broader questions of substance concer ing CATV development, both microwave and nonmicrowave, whic were not involved or settled in dockets Nos. 14895 and 15233. Thus, is asserted (1) that the trend of CATV entry into large populatio centers like Philadelphia and Cleveland poses a threat to the develo ment of independent stations and program sources, which will not b averted by the carriage and nonduplication requirements and whic may frustrate the goal of the all-channel receiver legislation in th communities with the most immediate promise for new UHF facil ties. It is also asserted (2) that generalized restrictions on the di tance the signal of a television station may be extended beyond th station's contour are necessary in order to prevent the multiplicity c local stations contemplated by the sixth report and order from bein ultimately displaced by a CATV "network" distributing the Ne York, Chicago, and Los Angeles stations nationwide. And it is a serted (3) that CATV systems should be required to select the statio they carry in an order of priority determined by the distance of eac station from the system, i.e., that the system should carry neare stations in preference to more distant ones, so as to avoid "leap frogging." Next, the petitions raise a question (4) as to whethe CATV systems should be limited to receiving and simultaneously re transmitting television broadcast signals without addition or deletio or should be subject to sections 315, 317, and 310 of the act and variou Commission policies (e.g., the "fairness doctrine" and concentratio of control policies). A related question is presented as to the possibl development of combined CATV-pay TV operations and the need fo regulation to avoid adverse consequences to the free television broad

[16] In this connection, comments are requested on the extent to which networks ar other program suppliers, through contracts or otherwise, affirmatively restrict duplicatio by translators.

cast service. And (5), it appears to the Commission that there are other areas of concern.

38. For the reasons next set forth, we believe that inquiry to ascertain the facts in each of these areas is warranted in the public interest. The inquiry will develop information upon which we can determine whether rules or legislative proposals to the Congress are appropriate.

(1) *Effect on Development of Independent (Nonnetwork) UHF Stations*

39. Of concern to the Commission is the mushrooming entry of CATV into major centers of population insofar as this affects the opportunities for new UHF stations. The developing pattern of CATV described by petitioners is confirmed by the CATV industry itself as an augury of coming events. The largest CATV group, H. & B. American Corp., recently advised its stockholders that CATV activity in larger cities is of first importance among significant CATV developments, stating:

> First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.
>
> But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. Baltimore will be the next large U.S. city to receive multiple CATV franchise applications.
>
> The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day. It is reported that at the end of 1964, 700 cities throughout the Nation were entertaining CATV proposals.
>
> In virtually every instance these authorizations are fought for in intensively competitive proceedings before local governing bodies. The applicants represent a cross section of the most prominent companies in the Nation. For example, in Philadelphia they include the Philadelphia Bulletin, Storer Broadcasting, the Philadelphia Inquirer-Triangle-Annenberg interests, a number of well financed influential local groups, and a sprinkling of large CATV organizations.

40. The shift in the locus of CATV activities to the larger cities is cause for concern as to the effect on UHF and the stated goal of Congress in enacting the all-channel receiver legislation to make "provision for at least four commercial stations in all large centers of population" (H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3). The following are the underlying congressional and Commission policy considerations as to development of the UHF:

41. (*i*) Congress has only recently reaffirmed the goal of "an effective national television" system through use of the UHF channels (*id.*, p. 6; see also p. 3). As the first item in such an effective television system, Congress listed the need "for at least four commercial stations in all large centers of population" (*id.* at p. 3). Such a

fourth station might make possible a fourth national network or th formation of FM-type "networks" in television, thus bringing adde diversity to the field. Or, as both House and Senate reports stres such a station might be "available particularly for local programir and self-expression * * *"—an important need in many markets "b cause all of the available stations are network affiliates" (H. Rep p. 3; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 4). In short, th fourth commercial station is important both to make our syste "truly competitive on a national scale" (H. Rept., p. 3) and to furth better local service.

42. (*ii*) Congress has also determined that the way to achieve th above goal is through effective use of UHF channels, since most larg centers of population now have three full network stations and r unoccupied VHF frequencies. While Congress was generally awa of CATV (e.g., the same Senate committee which considered th all-channel television receiver law in 1962 had held extensive hearing on CATV in 1959), it stated its view that all-channel receiver legisl tion, because it would develop UHF, "is not only the best but the onl practicable way of achieving an adequate commercial and educationa system in the United States" (H. Rept. at p. 4; S. Rept. at p. 7). therefore enacted this "unique" all-channel set legislation, statin the increased price which the consumer will have to pay, at lea initially, for all-channel sets "will be well worth the cost if this is th only way in which the American people can be assured of the benefi of television service to the fullest degree" (H. Rept. at pp. 8–9 Since the sale of television sets now exceeds 9,000,000 a year, th American people are now paying those costs, in the substantial amou of many millions each year.

43. (*iii*) There is every present indication that the all-channel s requirement is having its desired effect, and that the legislative goa is in the process of being realized. There has been greatly increase interest in UHF, with many applications filed—preponderantly fo the larger cities. See attached chart (app. A) showing the marke with no commercial UHF station on the air but with commercial UH construction permits granted and/or commercial UHF channels ap plied for. But as Congress noted in 1962, the all-channel law will no smooth the road for the UHF broadcaster overnight; rather, "Sub stantial time will have to elapse * * * before a large majority o the public becomes equipped with all-channel receivers" (H. Rept., p. 7; S. Rept., at p. 6).

44. (*iv*) The Commission also has noted that UHF stations fac considerable obstacles during this crucial period. UHF must over come the psychological factor of its previous failure in intermixe markets. Further, apart from intermixture and the initial limitatio on audience pending set conversion or turnover, independent UH stations in these cities will compete with three network affiliates fo audience attention without having the advantage of the attractio of the popular network programing. The Commission therefore ha stressed that it will not now take action which would be inconsister with the congressional goal and which might jeopardize the "invest

ient in all-channel receivers" (H. Rept. at p. 8) which has been asked f the American public.

45. The question before the Commission is what is the effect of 'ATV entry into the large markets upon the realization of the above oals for UHF. The problem is perhaps best pointed up by considera- on of a specific case—Philadelphia. That city is a prime example of potential UHF activity, with two UHF independent stations sched- led to go on the air in mid-1965. But Philadelphia is also a prime xample of CATV activities, with the CATV applicants in Philadel- hia proposing to carry the New York independents. The Philadel- hia UHF stations, in competing with three network VHF stations, ill be relying solely upon reaching an audience interested in inde- endent (nonnetwork) programing. Since the local competition is ot only VHF but enjoys the advantage of popular network program- ig, unexpected fractionalization of the audience interested in inde- endent programing could be particularly harmful to these independ- nt stations.[17] And, the CATV will be doing just that—bringing in hree New York stations which also direct their efforts to the audience nterested in independent programing. The crucial question is thus hether the result will be that New York independents will, in effect, e replacing Philadelphia UHF independents, with a concomitant ss of local service or the other advantages noted in paragraph 41.

46. The Commission needs further information with respect to that uestion before reaching a conclusion. On the one hand, it is urged nat CATV systems in Philadelphia or similar large cities will remain elatively small and do not pose any significant threat to the legislative oal noted in paragraph 41. See, e.g., Seiden report, pages 84–86. ndeed, it is urged that the CATV system will benefit the new UHF peration by bringing the UHF station's signal into homes which do ot yet have all-channel receiver sets or where UHF reception might therwise be difficult.[18] There are, however, indications running ounter to the claim that CATV operations will have relatively little npact. Consider, for example, the extensive nature of the CATV perations proposed in some of the large cities (in Philadelphia, we are old that a $40 million CATV investment is contemplated). And, enerally, the spirited competition for CATV franchises in major cities y well-financed groups would appear to reflect the confidence of the ATV applicants in their success.[19]

[17] Moreover, the nonduplication time period prescribed in dockets Nos. 14895 and 5233 is geared largely to the schedule of network program distribution, on the premise nat network affiliates will have a reasonable opportunity for viable operation if their opular network programing is not subject to CATV duplication. The prohibition against uplication 15 days before or after the local broadcast will provide only partial relief, t best, to independent stations, which rely on nonnetwork programing that is not pre- nted simultaneously, or nearly so, nationwide.

[18] We note, however, in connection with the Philadelphia example which we have been ursuing above, that the franchise application of Jerold Corp. in Philadelphia does not opose to carry the Philadelphia UHF stations on the CATV system, until such time as might convert from a 12-channel to a 20-channel system.

[19] We also note, in this regard, that the Seiden report (pp. 85–86) does not consider the kelihood that the Philadelphia audience which would be attracted to the programing of ie New York independent stations is the very heart of the audience at which any inde- ndent Philadelphia UHF station must aim. Instead, it is assumed that the potential hiladelphia audience for New York independent stations is like any other part of the hiladelphia audience, from the standpoint of Philadelphia independent stations. This ssumption, we think, raisea a question as to the correctness of the conclusion reached the report.

47. It may be, after development and study of the facts and co-sideration of the arguments of interested persons, that the probl will appear less serious or take on new aspects. Or, it may be th CATV systems should not enter markets like Philadelphia for a p-riod of 4 or 5 years—roughly the length of time remaining, wh Congress specified as necessary in order to permit the substantial effe of the all-channel set law to be felt (i.e., to permit UHF independ stations to gain a proper foothold). We need further informati before reaching a decision and, for that reason are initiating t inquiry. For, we do know that we would be wholly remiss in c responsibilities if we ignored the problem—and simply permitt events to occur (indeed, often with the aid of our authorizations the microwave services) which might jeopardize the congressio goals just set, and the "investment in all-channel receivers" wh the public is now making. If such goals are to be changed, that i matter for Congress (with our task to collect the facts and ma appropriate recommendations).

48. Accordingly, inquiry is warranted to determine the conditi under which CATV should be permitted to operate in areas w potential for independent stations. Such areas include not only co munities with four or more commercial channel assignments but a those areas where any new station would rely very substantially up independent programing sources because of overshadowing by th network services from nearby communities. Since we have no p conceived views as to the role of CATV in these areas or what co ditions might be appropriate, comments furnishing full informati as to pertinent factors and suggesting possible measures for achievi a reasonable accommodation are invited from all interested perso As a starting point, comments are requested on the measures and p posals urged by petitioners in this respect.

49. While the proceeding is underway, we shall carefully exami applications coming before us which involve the above problem. T means that pending the outcome of this proceeding, applications f microwave facilities to be used to relay the signal of any televisi station to a CATV system in a community with four or more co mercial channel assignments and three or more stations in operati (or with at least two stations in operation and one or more stati authorized or applied for) must be accompanied by a clear and f showing that in the particular circumstances a grant would not p a substantial threat to the development of independent UHF serv in the area. A like showing must be made in applications for mic wave facilities to serve a CATV system in a community where, cause of its proximity to another community (or communities) havi three or more existing commercial stations (e.g., within the grade contour of such three or more commercial stations), any new UH television station would be independent in operation.

50. The foregoing takes up the Commission's concern and course action as to microwave applications coming before it during t

erim period while the proceeding is underway.[20] The same con-n is applicable, whether or not the CATV proposes to employ crowave facilities, to situations where there is proposed large-scale ATV operations in major cities with burgeoning UHF independent velopment. Indeed, we note that the large-scale CATV operations posed for Philadelphia do not make use of microwave facilities. e therefore request comments on what interim course of action, if y, may be appropriately followed by the Commission in this respect.[21] nce the matter is of such short-term nature (i.e., pending resolution the proceedings), the shorter time period for comments and reply mments applicable to part I of the notice shall govern, and we will ich an early determination (see par. 30). In order to be in a posi-n to take definitive action, if appropriate, we specifically invite mment on whether the foregoing course of action as to applications fore the Commission should be extended to the nonmicrowave ATV system in the same type of situation (e.g., through a rule which uld prohibit the extension of the signal of any television station yond its grade B contour into a community with the situation de-ibed above (par. 49), without there having been a clear and mpelling showing that in the particular circumstances there is no eat to the development or maintenance of independent UHF serv-in the community). This is also one of the matters which we shall ng to the attention of the Congress. Finally, we believe that nchising authorities will give due regard to the fact that the tter is thus under Commission consideration.

) *Generalized Restrictions on CATV Extension of Station Signals*

51. Both the ABC and the AMST petitions urge that more general ion is necessary to prevent fractionalization of audience and tential damage to the nationwide system of television broadcasting rough a multiplicity of local stations contemplated by our alloca-ns scheme. Accordingly, they propose general limitations upon a ATV's ability to extend the service area of any station—either terms of distance from the station or of a specified signal contour some combination of the two.[22] The issue is particularly raised ether the extension—perhaps for hundred of miles—of the service a powerful station operating in a very large market (and thus e to devote more resources to obtaining programing) may have an ecially adverse impact upon the development or maintenance of the al stations contemplated by the allocations scheme.

[20] We have also taken into account, in our decision to adopt this interim policy, the fact t the areas to which the policy will be applicable do have a significant amount of vision service, with additional new UHF service in the offing.

[21] Such comments may discuss the jurisdictional as well as the policy considerations in particular course of action.

[22] We note in this connection that plans are on the drawing board for a CATV system acity of 20 channels. Interested persons may wish to address themselves to the ques-n of what effect CATV operations of this or a similar nature might have on local sta-ns in terms of fractionalization of audience, and whether some limitation as to the nber of signals carried should be considered.

52. We have reached no conclusion that broad-scale restrictio along these lines are warranted.[23] Rather, as a part of our gener inquiry, we invite comments directed to the proposals.

(3) "*Leapfrogging*"

53. Petitioners' assertions concerning the so-called leapfroggi issue (i.e., the distribution by the CATV system of distant signa in preference to signals of stations located much closer to the systen also raise a matter of future importance. Again we have reach no conclusion on this issue and would simply have the interested pa ties address themselves to it, both as to the facts and to pertinent poli considerations (and also the proposals which have been advanced l parties such as AMST in this respect). Thus, does it promote "t larger and more effective use of radio in the public interest" (see. 3 (g)), if the closer signals are carried (on the ground that carria of such signals would bring a programing service more likely to con closer to meeting the CATV community's interests than those fro a distant state)? Is such carriage called for in the public intere in order to extend the service area of UHF stations or VHF statio serving sparsely populated areas—and thus enhance, to some exte their chances of successful operation and their ability to serve ful the needs and interests of these areas?[24] If a policy along the for going lines were to be adopted, should it be accompanied by a co comitant duty, on the part of the station carried, to provide som amount of programing of particular interest to the people in t CATV's community? Cf. *Petersburg Television Corp.*, 10 Pike an Fischer, R.R. 567, 581j—584q; *NTA*, 22 Pike and Fischer, R.R. 2 295. What kinds of disruption or other problems would such a r quirement pose for CATV systems? If "leapfrogging" rules we adopted, is there a probability that the CATV, in order to meet t rules and still bring in desired distant signals, may distribute many signals that the fractionalization of the audience aspect becom much more serious (in the event there are local stations being carri pursuant to the requirements of the rules adopted in dockets No 14895 and 15233)? These questions by no means exhaust the list pertinent considerations to which we hope the interested parties wi address themselves.[25]

(4) *Program Origination or Alteration by CATV; Pay-TV or Combined CATV–Pay-TV Operations*

54. A fourth area of concern is the question of program originatio or alteration by CATV. There was some indication in dockets No

[23] Certainly, we have not concluded that there should be restrictions which might p vent areas now without the benefit of the basic services of the three national networ from ever obtaining those benefits. But here we note that AMST would appear to u exceptions to the general restrictions it proposes where a CATV makes a showing public need for its service.

[24] In this connection, we note our discussion in the report and order in dockets Nos. 1489 and 15233, par. 69, as to increased awareness by rating services and advertisers of CAT penetration and CATV extension of a station's service.

[25] We do not believe it necessary or appropriate, pending resolution of this issue, hold up all applications for microwave facilities to relay television signals to CATV sy tems. Rather, parties may bring public interest considerations pertinent to this issue our attention in connection with specific applications, and we ourselves shall examine su applications with this issue in mind.

4895 and 15233 that CATV systems may be originating advertising
aterial in some instances and deleting advertising from the station
gnals carried. We believe that inquiry is appropriate to determine
hether CATV systems should be subject to the provisions of sec-
ons 315 and 317 of the Communications Act and to a requirement
at there be no deletion of the station identification announcement
f any signals carried.

55. A related question is presented by the assertion of some of the
etitioners that CATV might become a vehicle of pay-TV or combined
'ATV–pay-TV operations. They express a fear that the end result
f such operations might be to siphon off top attractions from free
levision, if the fees obtained from large-scale CATV operations
ould enable CATV operators to outbid television broadcast stations
the program supply market, or that it might prove to be the means of
gradual transition from advertiser-supported free television to pay-
V generally. It is further urged that CATV systems should not
e permitted to use the distribution of free television signals as a base
or engaging in pay-TV operations. We have been advised of at
ast one instance where a CATV system has devoted a channel on
ie cable exclusively to the presentation of its own programing (both
ATV originated local programs and films acquired from others).

56. The possible impact of subscription television on free television
roadcast service has been a continuing subject of Commission and con-
ressional concern. See *Third Report on Subscription Television*,
3 F.C.C. 265; *Connecticut Committee Against Pay TV* v. *Federal
ommunications Commission*, 301 F. 2d 835 (C.A.D.C.), *cert. den.*
71 U.S. 816. In light of that concern, comments are requested on
ie feasibility or desirability of pay-TV operations by CATV, whether
ıy conditions would be required for the protection of the public in-
rest in free television, and what conditions might be appropriate.[26]

57. In short, comments are requested as to whether CATV systems
ould be limited to simultaneous distribution of station signals with-
ıt additions or deletions, or whether there should be no limitation on
ogram origination by the CATV, or whether some intermediate
osition would be appropriate. The Commission has reached no
nclusions in this area, and requests comments on all facets of the
uestion. For example, in addition to the two basic issues posed
ove (i.e., complete restriction or complete freedom as to program
igination), there are intermediate issues where comment might be
lpful. Thus, comments are invited on the question of whether any
ch prohibition against CATV program and advertising origina-
on should apply only where the CATV is operating in an area
rved by one or more television broadcast stations. In the absence
any local station, would the public interest be served if the CATV
ere not only permitted, but even encouraged, to serve the community
providing an outlet for local self-expression? Where there is but
e local station, should the CATV be barred from carrying advertis-

[26] This proceeding is in no way intended to be concerned with, or to affect, the question
whether there is a property right in the broadcast signals carried by CATV systems
e FCC 65 —, par. 159).

1 F.C.C. 2d

ing but permitted and encouraged to present local programing, part-
ularly in the news and public affairs field (on the ground that su
local programing provides a needed diversity in a monopoly situ-
tion, and poses no threat to the viability of the local station)?

58. Some of the foregoing matters may be appropriate for Co-
mission rulemaking (e.g., the sec. 315, sec. 317, or station identificati
requirements), while others may call for congressional considerati
and resolution. Again, we think that as a matter of "first thin
first," we should garner the facts and pertinent considerations.

(5) *Other Areas of Concern*

59. In view of the interest engendered concerning ownership a
control of CATV systems, comments are requested on the propos
of petitioners with respect to the regular filing of information as
CATV ownership, control, and management (see particularly t
Boise and AMST petitions). Would it be appropriate to require t
periodic filing of other information, such as the location of the CAT
system, the number of subscribers, the signals carried, and the exte
of program origination, if any? While much useful informati
was gathered in connection with dockets Nos. 14895 and 15233, t
statistics will soon be out of date in a rapidly changing CATV fie
Moreover, the questionnaire discussed in paragraph 34 above
occasioned by a lack of specific information with respect to ea
CATV system. It appears to us that it might be more efficient a
serve the convenience of interested persons, as well as the Comm
sion, if pertinent information were regularly supplied by each CA
operator on a current basis.

60. The general matter of cross-ownership of CATV systems a
broadcast facilities is being pursued separately in docket No. 154
Interested persons are nevertheless invited to address themselves
this proceeding to those aspects of the cross-ownership question wh
may be pertinent to the overall policy questions raised here. F
example, there is the question of whether grants for translator fac
ties or local stations should be made to CATV systems in commu
ties which have no off-the-air television service where there is no i
minent likelihood of an independent applicant. In other wor
would the public interest be served by permitting, or even encour
ing, CATV systems to provide an off-the-air service to areas wh
would otherwise have none? Should a similar policy be followed
provide a second off-the-air service, or would cross-ownership affo
the CATV licensee and unfair competitive advantage over the in
pendent licensee? (see FCC 65–335, pars. 91, 134).

61. Another area of great interest to the Commission is the p
posal in Dr. Seiden's report that rulemaking action should be tak
to afford potential and existing stations a sufficiently large serv
area to withstand CATV penetration. This proposal is set out
detail at pages 7, 89–90 of the report and will not, therefore, be
peated here. Comments are requested as to the feasibility and mer
of the proposal and the most appropriate way of implementing

fore generally, we are of the opinion that all of our rules and policies ould be reexamined to see if they are holding back or encouraging variety of off-the-air services. In this connection, there is pending proposal to facilitate the use of translators on allocated channels FCC 65–129, docket No. 15858).

62. Some of the petitioners have urged the Commission to estab- sh appropriate technical standards to govern the operation of CATV stems, e.g., with respect to the technical quality of signals distributed CATV. It appears to us that the matter of technical standards arrants inquiry. As a starting point, comments are requested on e proposals of petitioners (see RM-636 filed by Springfield, p. 6, . 6 above, and the proposal of AMST, p. 12, par. 25(1) above).

63. The foregoing discussion has been directed toward CATV op- ations vis-a-vis television broadcast facilities. It has been brought our attention that a standard broadcast or FM radio station might ce serious audience fractionalization if a CATV system were to ing a member of competing aural signals to its subscribers. Ac- rdingly, comments are requested as to whether any serious prob- m exists, or is likely to exist, in this area and, if so, the nature of y regulatory measures which might be appropriate to govern the stribution of aural signals by CATV.

64. In sum, inquiry to ascertain the facts and appropriate policies each of these areas is warranted in the public interest. Nor do we ean to restrict comments just to the above areas. Persons may, of urse, point up other facets of this overall problem where remedial tion may be appropriate (e.g., whether our policies with respect to her auxiliary services, such as translators or satellites, should be odified). The information developed might be useful to the legisla- ve consideration of CATV and would assist the Commission in aking recommendations to the Congress. Moreover, a sufficient basis s been shown to establish that additional rules may be required for lequate protection of the public interest and the regulatory scheme. the absence of further information, we do not have a sound basis for ecific rule proposals. However, in order to be in a position to take y rulemaking action found appropriate at the conclusion of this roceeding, without conducting new proceedings, comments are re- ested on the proposals of petitioners and the additional matters dicated above. Counterproposals as to possible alternative measures e also invited. We stress, however, that the main thrust of this roceeding is to gather the facts and to obtain the comments of the rties on the pertinent policy considerations. A further notice will all likelihood be issued to afford an opportunity for comment on the ecific rule proposals of the Commission.

65. The inquiry and proposed rulemaking are directed toward all ATV systems. The questions raised by petitioners or indicated by e Commission are pertinent to our responsibilities in licensing micro- ave facilities for CATV use, whether or not rules governing all ATV systems are ultimately adopted. Consideration of nonmicro-

wave CATV systems is included in order to conserve time and to avoi the necessity for a second proceeding, particularly in the event tha no legislation is forthcoming and the comments in this proceedin confirm our initial conclusion that the Commission has present juris diction over all CATV systems. Moreover, we believe it appropriate as requested by one of petitioners, to put all persons who now operat or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the natur indicated, whether microwave is used or not. All Commission action taken during the pendency of this proceeding will, of course, b subject to the outcome of the proceeding and any rules adopted wil be made appropriately applicable, such as at license renewal time.

66. Accordingly, there is instituted herewith, pursuant to the provi sions of section 403 of the Communications Act, an inquiry into th foregoing matters. Authority for the rulemaking proceeding in stituted herein is contained in sections 2, 3, 4(i), 303, 307, 308, 309 310, 315, and 317 of the Communications Act of 1934, as amended.

67. All interested persons are invited to file written comments o the rule amendments proposed in part I, and on paragraph 50, on o before June 25, 1965, and reply comments on or before July 26, 1965 Comments on the inquiry and proposed rulemaking in part II may b filed on or before August 27, 1965, with reply comments due on o before October 25, 1965. In reaching its decision in this matter, th Commission may also take into account any other relevant information before it, in addition to the comments invited by this notice.

68. After study of the comments, the Commission may, by sub sequent order, specify a number of days for the presentation of ora argument on these important matters. It is also contemplated tha oral testimony may be solicited, and appropriate orders specifying the nature and time may be issued at a later date. After comments have been received, the Commission may well spin-off portions of the rulemaking for early decision, since other portions may require lengthy consideration.

69. In accordance with the provisions of section 1.419 of the Com mission's rules and regulations, an original and 15 copies of all com ments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished the Commission.

70. In light of the foregoing, *It is ordered*, That the various re quests made in the pleadings filed by American Broadcasting Co., Springfield Television Broadcasting Corp., Boise Valley Broadcasters Inc., Westinghouse Broadcasting Co., Inc., Association of Maximum Service Telecasters, Inc., Capital Cities Broadcasting Corp., Taft Broadcasting Co., and National Community Television Association, Inc., *Are granted in part*, to the extent reflected in this notice, and *Are otherwise denied.*

APPENDIX A

ARKETS WITH NO COMMERCIAL UHF STATION ON AIR BUT WITH COMMERCIAL UHF CONSTRUCTION PERMITS GRANTED AND/OR COMMERCIAL UHF CHANNELS APPLIED FOR

	Commercial VHF stations on air	Commercial UHF construction permits	Commercial UHF channels applied for	Vacant commercial UHF channels
anta, Ga	3	1		
stin, Tex	1	[1] 2		
stin-Rochester, Minn.-Mason City, Iowa	3		1	2
ltimore, Md	3	1	1	
mingham, Ala	2	1	1	
arlotte, N.C	2	[1] 1		
arleston-Huntington, W. Va	3	1		
ncinnati, Ohio	3	1		
veland, Ohio	3		2	
lumbus, Ohio	3		1	
llas-Fort Worth, Tex	4		2	1
troit, Mich	3	[1] 2	1	
gene, Oreg	2			1
uston-Galveston, Tex	3	1	3	2
dianapolis-Bloomington, Ind	4		1	2
ksonville, Fla	2	1	1	
lin, Mo.-Pittsburg, Kans	2		1	2
nsas City, Mo	3		2	
bbock, Tex	2		2	
ridian, Miss	1	1		
mi-Fort Lauderdale, Fla	3	[2] 2	1	
llas, Tex	1	1		
neapolis-St. Paul, Minn	4		1	
w Orleans, La	3	1	1	2
folk-Portsmouth-Newport News, Va	3	1		
ahoma City, Okla	3	1		
ladelphia, Pa	3	3		
sburgh, Pa	3	2		
vidence, R.I	2	1		
Louis, Mo	4	1		1
Diego, Calif	2	1	1	
Francisco-Oakland, Calif	4	3	1	1
Jose-Salinas-Monterey, Calif	2	1		1
edo, Ohio	2	1		
sa, Okla	3	1		1
ce, P.R	2	1	1	1
Total	96	34	25	17

[1] A permittee has gone on the air since Jan. 1, 1965.
[2] There is also a C.P. for a commercial VHF station.

APPENDIX B

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose the act is the regulation of interstate and foreign commerce in communication wire and radio, and that to efficiently achieve this purpose, authority over h commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) tes that the "provisions of this Act" shall apply to "all interstate communica- n by wire or radio * * * and to all persons engaged within the United States such communication * * *." These terms are defined in section 3 of the . Section 3(a) defines wire communication as the "transmission of * * * tures, and sounds of all kinds by aid of wire, cable, or other like connection ween the points of origin and reception of such transmission, including all trumentalities, facilities, apparatus and services (among other things, the eipt, forwarding, and delivery of communications) incidental to such trans- ssion." Section 3(b) defines communication by radio as the "transmission radio of * * * pictures, and sounds of all kinds, including all instrumen- ties, facilities, apparatus, and services (among other things, the receipt, warding, and delivery of communications) incidental to such transmission." rom the plain language of these definitions, there would seem to be no stion but that CATV systems are engaged in interstate communications by

wire or radio. They transmit "pictures, and sounds * * * by aid of wire" are "instrumentalities * * * [used for] * * * the receipt, forwarding, and livery of communications * * * incidental to such transmission," and hence within the definition of wire communication under section 3(a).[1] Moreo CATV systems constitute interstate communication by wire, since they for connecting link in the chain of communication between the point of origin transmitting station) and reception by the viewing public (the CATV scriber)—a chain which "is now well established * * * as interstate c munication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Re Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).[2] The law clear that the mere location of communication facilities wholly within one S does not establish that the communication service rendered over such facili is an intrastate service, and that a communications service can be interstat foreign in nature and subject to the Commission's jurisdiction even though the facilities are located within the confines of one State. *California Interst Telephone Company* v. *F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward* v. *Northern C Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific Telatro Inc.*, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of interstate service of the television broadcast stations whose signals they ca *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), and h constitute "interstate communication by wire" to which the provisions of act are applicable (sec. 2(a), 3(a)). See *American Trucking Association United States*, 344 U.S. 298, 311.[3]

With respect to the Commission's authority to adopt the rules proposed in notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] that are to be applied to CATV systems, there are the following sections: Sect 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the cru sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As notice and the report and order in dockets Nos. 14895 and 15233 make clear, existence and growth of CATV systems threaten to impede realization of Commission's television assignment plan and policies under sections 1 and 307 (i.e., the sixth report and order).[4] See *Carter Mountain Transmission Cor F.C.C.*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963). The Comm sion has authority under sections 4(i), 303(f), 303(h), and 303(r) to:

> perform any and all acts, make such rules and regulations and issue s orders, not inconsistent with this act, as may be necessary in the execu of its functions (4(i));
> make such regulations not inconsistent with law as it may deem neces to prevent interference between stations and to carry out the provision this act * * * (303(f));
> establish areas or zones to be served by any station (303(h)); make s rules and regulations and prescribe such restrictions and conditions, inconsistent with law, as may be necessary to carry out the provision this act * * * (303(r)).[5]

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[1] It can be argued that CATV systems, in receiving, forwarding, and delivering station's signal to the viewing public, are the instrumentalities incidental to the tr mission of the signal and hence fall within the definition of "communication by radio sec. 3(b). However, it is unnecessary to consider this argument in view of the discus above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV o tions clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise st is not essential to the question of the Commission's jurisdiction to proceed as propose the notice of inquiry and proposed rulemaking.

[2] Congressional approval of the *Capital City* doctrine was expressed in connection the 1960 amendment to sec. 202(b). See 105 Cong. Rec. at 6256.

[3] It is, we believe, significant that in sustaining the jurisdiction of the Interstate C merce Commission in *American Trucking* the Supreme Court relied solely upon provis of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. and 153 (a) and (b).

[4] In addition, as noted in the notice, there exists the potential to frustrate the purp of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commis regulations).

[5] Sec. 303 (f), (h), and (r) are preceded by the following clause:
"Except as otherwise provided in this Act, the Commission from time to time, as pu convenience, interest, or necessity requires shall—"

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act g., secs. 1 and 307(b)) with respect to communications or persons coming thin the Commission's jurisdiction (including CATV—sec. 2(a)). Section 3(h), in particular, was affirmatively designed to assist the Commission in ectuating the fair and equitable distribution of broadcast service called for section 307(b).[6] The Commission's authority to issue rules establishing the ea or zone to be served by any station for this purpose includes the power to event infringement of the rules by "any person" (secs. 312(b) and 502 of the mmunications Act). Hence, it clearly encompasses, we believe, the authority prescribe by rule the conditions under which the station's signal may be ended beyond the area or zone to be served by the originating station. by ans of CATV—an "interstate communication by wire" to which the act's visions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the mmission (secs. 4(i) and 303(r)) includes authority to take necessary action, inconsistent with the act or law, to prevent frustration of section 307(b) by TV. In *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 215–220, the Supreme urt citing, inter alia, sections 1, 303(f), and 303(r), stated that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * *. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.

der such "expansive" and "comprehensive" powers,[7] the Commission has thority to take reasonable and appropriate action, including promulgation of es, "as may be necessary" to carry out the provisions of section 307(b)—ensure that the regulatory scheme embodied in that section (the equitable tribution of service) and section 303 is not frustrated by the operation of TV, an "interstate communication by wire" to which the act's provisions are plicable. This authority does not depend on a specific reference to CATV or TV practices in the act. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 2, 203. See also, *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 3–219, where the Supreme Court stated:

> True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards

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Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 ore the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st Sess., 40–41.

See also, *Stahlman* v. *F.C.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended compresive scope of Commission authority see, e.g., the following legislative history of the dio Act of 1927, which was reenacted in all substantial respects in the Communications of 1934 (78 Cong. Rec. 8822–23, 10313–14, 10990); 66 Cong. Rec. 5479; S. Rep. 772, h Cong., 1st Sess., pp. 2–3.

F.C.C. 2d

for judgment adequately related in their application to the problems to be solved.[8]

To the same effect in other fields, see *Houston, East and West Texas Ry. Co.* v. *U.S.*, 234 U.S. 342; *U.S.* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *U.S.* v. *Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc.* v. *U.S.*, 344 U.S. 298; *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

> Included in the Act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a)(19).

We point out that section 201(a)(6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in certain circumstances, sections 202(a) and 203(a)(19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the Act," stating (at pp. 309–310):

> Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draft-men of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every ill sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–220; * * * Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created. *

See, also, *Public Service Comm. of N.Y.* v. *FPC*, 327 F. 2d 893, 896–97 (C.A.D.C.).

Of course, the rules must be "reasonably necessary and fairly appropriate for the protection of the regulatory scheme. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 913, 952 (C.A. 10). See also, *American Trucking Assn.* v. *U.S.*, 344 U.S., at 314–315; *National Broadcasting Co.*

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[8] The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated (319 U.S. at 217–218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the license for both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

[9] The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303 of the Communications Act. The Court stated (327 F. 2d at 897): "All authority in the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems in administration in regulating this huge industry and should have a basis for coping with such confrontation."

319 U.S. at 219 ("Generalities unrelated to the living problems of radio
unication cannot justify exercises of power by the Commission").[10] The
t and order in dockets Nos. 14895 and 15233 demonstrates the appropriate-
and necessity of rules requiring all CATV's to carry local stations with-
duplication for a reasonable period. Moreover, the *Carter Mountain*
ion establishes the reasonableness of the requirements. In affirming the
nission, the Court stated that "this does not appear to us an unreasonable
tion" but rather "a legitimate measure of protection for the local station
the public interest" (321 F. 2d 359, at 363–364). The notice of inquiry
proposed rulemaking similarly demonstrates the validity of the Commission's
rn as to the effect of CATV on independent stations and programing sources,
ll as on the development of UHF in the larger markets.
conclusion, it would appear that under the broad regulatory powers vested
by the Communications Act, the Commission presently has jurisdiction
all CATV systems, whether microwave is used or not; that there are
ient provisions of the act applicable to the exercise of authority over such
ms (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403);
hat the proposed rules and inquiry represent a reasonable exercise of that
rity in the circumstances.

EMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

oneur in the notices to the extent that they seek data for resolution
e matters here before us, but dissent to the indication of present
rity over CATV.

ON OF COMMISSIONER LOEVINGER CONCURRING IN PART AND DISSENTING IN PART IN DOCKETS NOS. 14895, 15233, AND 15971

(Proceedings re CATV's)

* * * * * * *

e Commission is issuing today a report and order, a notice of in-
and of proposed rulemaking, a memorandum on jurisdiction
he text of new rules all of which relate to the problems posed by
unity antenna television systems, commonly referred to as
V's. These documents aggregate over 120 pages and set forth
a mass of detail that the outlines of the problem, as well as the
issues, are somewhat obscured, if not wholly submerged. Ac-
ngly, it seems worthwhile to restate very briefly and simply what
roblems and the issues are, in order to indicate my points of agree-
and disagreement with the majority.
CATV is a system comprising an antenna for receiving television
ls, and cables and auxiliary apparatus (such as amplifiers) for
ing the signals received into a number of receiving sets. CATV's
bout as old as commercial television itself, the first systems having
started as early as 1950. CATV's have been developed in order
the wants of those who either because of distance or terrain were

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e Commission clearly has no jurisdiction over bowling alleys or theaters, for ex-
as an administrative agency has no greater power than has been conferred by Con-
Stark v. *Wickard*, 321 U.S. 288; *NLRB* v. *Atlantic Metallic Casket Co.*, 205 F. 2d
C.A. 5). Cf. *Peters* v. *Hobby*, 349 U.S. 331. However, unlike bowling alleys and
rs, CATV systems intercept and extend the signals of television stations, and thus
uniquely close relationship to the regulatory scheme. Moreover, CATV systems are
d in interstate communication by wire to which the act's provisions are expressly
ible.

.C.C. 2d

unable to get television signals off the air in satisfactory quality r numbers. (See articles in Television Magazine, June 1962, Septem r 1964, and April 1965.)

For a variety of reasons, some of them related to actions of the FC the commercial CATV business has developed through independ companies which transmit or relay the signals and other compan which distribute the signals to subscribers. Typically there will e an antenna on some high point near a community which receives e signals of a number of TV stations. These signals will be transmitt either by microwave relay or by coaxial cable to a point in the sett part of the community. At this point the relay company will deli the signals to the CATV operating company. The latter will maint and operate the system which distributes the signals over wires to e homes of subscribers within the community. In some cases the re company will deliver signals to several CATV companies.

CATV's were started in mountainous areas of Pennsylvania a Oregon where television reception was either poor or nonexistent many communities. As it appeared that CATV's were able to br good reception and offer a variety of services to communities far o side the major metropolitan centers, the companies spread to more co munities and got more subscribers. Over the years, as television grown in both numbers of broadcasting stations and numbers of hou CATV has also grown, although by no means in proportion. In rou figures there are now about 566 television stations in the United St covering some 266 markets. (Television Magazine, April 1965, p. 8 Over 52 million U.S. households have television receivers, which is percent of all of the U.S. households. (Ibid.) The CATV indus today has about 1,300 operating systems serving about 1.2 mill homes. (Seiden report to the FCC, p. 1.) CATV's are concentra largely in one- or two-station markets. Most systems are fairly sm in size, about 90 percent having fewer than 3,000 subscribers, and average having about 655 subscribers. Most CATV's deliver signals to their subscribers, although some deliver as few as three some as many as seven or more. (Ibid.) However, the number size of CATV's is growing and CATV systems are being offered more communities, and to larger communities.

The proliferation of CATV's is regarded by many in the televis business as an economic threat. It is said that while the broadca has the burden and expense of providing programing which the au ence gets without payment and which must be supported by adver ing, the CATV operator simply delivers the broadcasters' program to subscribers and receives payment from them. This is said to c stitute unfair competition. It is also alleged that the competitio not only unfair but destructive in some situations, because CAT deliver the signals of far-distant stations and deliver a relatively la number of signals to relatively small communities in which the au ence is not large enough to support a number of stations. CAT create the anomaly that some relatively small towns are provided w a greater choice of television programing over the local CATV t many larger cities have in the absence of CATV.

1 F.C.C. 2

These circumstances have created a demand by many broadcasters the FCC to take jurisdiction over CATV's and to institute measures protect television broadcasters against competition of CATV's. As ll be pointed out in some detail below, the FCC has instituted several ceedings and investigations relating to this matter. However, retofore it has not taken any definitive action of general significance. hile there has been some question as to the extent of the FCC juris- tion, the Commission has had undisputed jurisdiction with respect licensing microwave transmitting facilities for those relay com- nies that carry TV signals by microwave. The manner of exercising t jurisdiction is one of the matters that has been bitterly disputed l that is involved in the present proceedings.

By the documents which the Commission is now promulgating it opts a series of measures which represent the conclusion of the mmission majority as to the action that the Commission should e in this field. There are four significant measures involved.

First, the Commission rules that CATV's must carry the signals all local television stations without material degradation. The mmission exercises power over the CATV's by requiring licensed crowave relay companies to require their customers to comply with Commission conditions.

Second, the Commission rules that the relay companies must require CATV's which they serve to avoid the delivery to their customers the television signals of any program which duplicates the program any local station. This rule of nonduplication does not refer merely simultaneous duplication, but requires CATV's to avoid presenting duplicate program either 15 days before or 15 days after the date of adcast by a local station. Thus, this rule provides that the CATV's ved by the relay companies subject to the rule must avoid duplica- n of any local TV program for a period of 30 days.

Third, the Commission asserts jurisdiction over all CATV relay npanies and systems, including those that are wholly intrastate l that transmit signals entirely by wire. Although this conclusion called "tentative," the background demonstrates that there is no ctical possibility of dissuading the Commission from this conclu- n. The Commission gives notice that the substantive measures eady adopted will be extended to the full limits of this asserted isdiction as soon as the procedural amenities can be completed.

Fourth, the Commission institutes an "inquiry" seeking further ment on more than a dozen and a half questions, all of them relat- g to the possibility of imposing further restrictions upon the opera- ns of CATV's.

It seems to me that in its approach to the CATV problem the Com- ssion is doing the wrong thing for the wrong reason in the wrong nner to deal with the wrong problem. It is thereby erecting only gossamer barrier against the evils which it fears.

The Commission is doing the wrong thing when it seeks to control, rectly or indirectly, the specific programs which shall be presented the audience. The Commission is acting for the wrong reason cause it seeks only to limit competition. The Commission is pro- ding in the wrong manner because it is acting to extend its juris-

diction beyond statutory language and contrary to precedent. The Commission is dealing with the wrong problem because it concentrates attention only on the single matter of competition for listener attention and substantially disregards more important and more basic problems. Finally, the Commission is erecting only a gossamer barrier against feared evils because the actions taken and proposed are not only wrong but must ultimately prove to be ineffective. Assuming that the Commission will assert jurisdiction over all CATV companies, that it will impose nonduplication rules, and disregarding the risk that the action will be set aside for lack of jurisdiction, at best these rules will give slight and marginal protection against competition, and at worst they will be wholly overturned on the whim of some future Commissioner. This is not a sound basis on which to build an industry.

Basically I concur in two of the four rulings made by the Commission today and dissent from two of the four. I agree that the Commission should, within the scope of its jurisdiction, require CATV carriage of local television stations without degradation, and that it should implement the rule so as to insure its effectiveness. I have no disagreement with the substance of the rules regarding carriage of local stations. I also agree that the Commission should undertake an inquiry into the role and scope of CATV's, although I have some reservations as to the inquiry now initiated by the Commission. I disagree with the nonduplication rule which I believe is an improper attempt to limit competition by controlling programing; and I cannot agree with the Commission's attempt to extend its jurisdiction without congressional authorization.

While I heartily agree that the Commission should conduct a sweeping inquiry into the role and scope of CATV's in the field of mass communications, it seems to me that the present inquiry is too limited and too late. It is too little because it does not deal with fundamentals. Many of the important issues in the field are mentioned in the notice of inquiry, but they are scattered through the somewhat diffuse discussion in random fashion, even occurring in footnotes. But the basic issues are not mentioned. These are what the functions of CATV's should be, and what ultimate mode and system can be developed or encouraged to provide the greatest service to the greatest number. In various paragraphs of the instant orders and opinions CATV's are discussed as being ancillary or subsidiary facilities to broadcasting and as being a service competitive with broadcasting. These concepts seem inconsistent to me, and differing regulatory consequences flow from them. For example, if the services are truly competitive, then there is some reason to prohibit or discourage joint ownership of broadcasting facilities and CATV's. On the other hand, if the services are ancillary, then that reason does not exist, and broadcasters should be permitted, and perhaps encouraged, to own CATV's. At the present time the Commission is deferring action on a large number of broadcast license renewals because the licensees also own CATV facilities. This action seems inconsistent with some of the positions adopted in these proceedings.

In any event, the present inquiry is too late because the Commission has already formed its opinion on this subject. I believe the Com-

1 F.C.C. 2d

sion should make its investigation and conduct its inquiry before ching its conclusions, rather than afterwards. The documents ied today plainly show that the Commission and its staff have ng and fixed views regarding the subordinate place of CATV's the mass communications system, and these views are not likely to much influenced by anything that can be presented to the Comsion in the course of the inquiry. Even if some Commissioners hold h views, it would seem to me to be more courteous, more productive, l more wise to refrain from officially promulgating them until the mal "inquiry" has been completed.

n any event, I cannot agree that it is proper for the FCC to ermine, either directly or indirectly, which programs shall be ried by a CATV system. It seems to me that the basic issue is ether the Commission should employ economic and engineering es in order to achieve economic and engineering objectives, or uld exert direct control over the substance of programing in an rt to achieve its objectives. The method of selective program con-l, which the majority adopts here, will beget future problems and re control. Problems will arise because of delay, changes in plans broadcasting of particular programs, the requirements of section and "fairness," and section 317, and other provisions, to pose only w examples that can readily be foreseen of the numerous problems ly to arise under this rule. Suppose that a local station advises a TV that the latter cannot carry some program because the station nds to carry it, and then the station, for whatever reason, does not ry the program? As a practical matter, the CATV will not have other opportunity to carry the program once the date of its adcast has passed. Will the FCC then require the local station to ry this program? Will that depend upon the Commission's denination of the value of the particular program? We know from erience that documentary and political programs are those most ly to be delayed or omitted. Will the Commission permit these grams to be taken off the CATV at the whim of the local station ner without insuring that he does carry them? It seems unlikely to that the majority will be willing to do this. However, I doubt t those broadcasters who now clamor for a Commission rule on duplication will welcome this new grounds for Commission ulation of their programing.

Even more provocative questions are posed with respect to political graming. Suppose a distant station, carried on a local CATV, carrying a series of political programs on a presidential election ich is balanced as between the major parties. A local station ides to carry those network programs presenting the views of one the two major parties. It notifies the CATV which then blanks these programs on its circuits. The local station will then have balance out its own programing by presenting the views of the er major party over its broadcasting facilities. But the programs the distant station carried on the local CATV will be unbalanced e they will present only the programs presenting the views of one ty. Most important, the local public will then have an unbalanced sentation since it will have the programs favoring one party pre-

sented over two stations on the local system, whereas the progra favoring the other party will be presented over only one of the lo channels and there will be only half as many of the latter. This obviously a device that could easily be used to give the public a ve biased political presentation during a campaign. Is the FCC th going to supervise CATV systems to see that their programs comp with all of the requirements of section 315 and "fairness"? How w this be accomplished? Will the FCC require program origination CATV's? These and a host of other problems flow directly a inevitably from the approach adopted here. To say that any sing situation is unlikely is not an adequate response. The records of t FCC and its own attempts to influence programing are eloquent tes mony that situations such as those suggested, and others more bizar and unusual, do occur and recur.

It should be noted that the rules now adopted by the Commissi are based in significant part upon its concern for the preservation "local live" programing, and that the notice of inquiry suggests th the protection which the Commission is now bestowing upon broa casting stations is likely to be "accompanied by a concomitant duty the part of the station" to provide "local live" programing. S notice of inquiry, paragraph 53. Thus, the nonduplication rule not only a direct intrusion into the programing area through contr of CATV's, but is also another argument to buttress the case f further Commission control of the programing of broadcasters. E lieving, as I do, that the Commission should not seek to control pr gram content in the field of broadcasting, I am opposed to th approach. See separate opinions in *Lee Roy McCourry*, 2 R.R. 2d 8 (1964); *George E. Borst, et al.*, FCC 65–207 (1965); *The Role Law in Broadcasting*, 7 J. of Bdcsting. 113 (1964); *Religious Liber and Broadcasting*, 33 Geo. Wash. L.R. (March 1965).

One practical factor that seems to be left out of consideration the adoption of a nonduplication rule is that this is the approac which is most likely to provide incentive, if not virtual necessity, f CATV's to undertake the origination of their own programs. Th operation of the nonduplication rule means that the CATV operato are required to delete material from the programs which they recei and deliver to subscribers and it also means that when such materi is deleted the CATV is left with a vacant channel. While the econom pressures and motivations will undoubtedly vary from situation situation, this kind of situation provides both the opportunity an incentive for program origination; and therefore, in the long run, likely to engender more competition for the local television statio than it avoids. It seems to me to be far more simple and effective, n to mention wise and appropriate, to require that CATV's shall carr local stations, that they shall not alter or degrade the signals th they carry, and that they shall meet such other engineering requir ments as may be found appropriate, and to leave determination programing to the broadcasters without forcing the CATV operato into the area of program selection and encouraging them to enter th area of program origination.

1 F.C.C. 2d

The most important and fundamental legal objection to the present ommission action is its lack of adequate jurisdictional basis. The ıle promulgated by the Commission at this time undertakes to egulate the programs that may be carried by CATV's by requiring ommon carriers that serve the CATV's to impose upon their cus-omers, as a condition of service, the limitations contained in the Com-ıission rules. The Commission has repeatedly rejected this basis of ırisdiction in the past, as appears from the cases cited and quoted elow. But regardless of lack of support in precedent or statutory ınguage, the logical implications of this approach should warn of its nsoundness. If the Commission can impose its will on a person or ısiness entity that is the customer of a common carrier by the simple evice of requiring the common carrier to act as the Commission's oliceman in order to keep its license, then the Commission can regu-te any business in the United States. Every business and most tizens are customers of the telephone and telegraph companies. It as never previously been suggested that this fact subjected them to egulation by the FCC. But if today's decision stands, then that is ıe law. The Commission need no longer be constrained by any chnical limitations on its jurisdiction arising from statutes enacted y Congress, if this theory is sustained by the courts. The rule adopted v the Commission today applies to CATV's served by the telephone ompany as well as to those served by CATV relay companies. But ıere is nothing in the logic of the Commission's jurisdictional ap-roach that limits this technique to CATV's. If this jurisdictional ındation is sound for CATV's, the Commission may, by precisely the ıme technique, impose its regulations on theaters or newspapers, on ock brokers or taxicabs, indeed on any business or person that needs ıd uses the services of a communications common carrier.

The Commission's assertion of direct jurisdiction over companies ıat receive broadcast signals and transmit them wholly by wire within single State, without any specific statutory foundation, is equally arming in its implications. The principal argument urged in sup-ort of the Commission's jurisdiction over such companies is that it desirable for the FCC to have such jurisdiction in order to attain ıe broad general objectives of the Communications Act. However, this reasoning is sound, then the jurisdiction of the Commission is terally unlimited. There is scarcely any aspect of organized social ving that is not in some way related to the complex ramifications of ıe communications system that is now under the jurisdiction of the ommission. If the Commission has authority to deal with any ctivities which "threaten to impede realization of the Commis-on's * * * plan and policies" (memorandum on jurisdiction) then can control all amusements, the field of journalism, the scheduling f movements by trains, planes, and ships, not to mention almost any her activities that is either competitive or ancillary to or an im-ortant user of communications. Such vague and broad reasoning mply will not sustain jurisdiction as to activities not plainly within ıe scope of some more specific statutory language. See *F.P.C.* v. *anhandle Co.*, 337 U.S. 498 (1949).

1 F.C.C. 2d

When the Communications Act itself is examined it is found th not only is language lacking to give the Commission jurisdiction whi it undertakes to assert here but the language of the statute expres denies that jurisdiction.

Section 1 of the act, 47 U.S.C. 151, states the purpose of the act most general terms and states that the FCC is created pursuant to t purpose. However, it does not define or confer any jurisdiction.

Section 2 of the act, 47 U.S.C. 152, says in its first subdivision th "the provisions of this chapter shall apply to all interstate and forei communication by wire or radio * * *." It does not state that t Commission has jurisdiction over all such communication. Rather describes in general terms the scope of the act and the outermost lir tations of its application. However, it says that within these outerm limits the act applies pursuant to its provisions. In other words, order to find jurisdiction within the scope described by the first su division of section 2, it is necessary to find some specific provision the act conferring jurisdiction.

This is emphasized by the second subdivision of section 2, whi specifically says that nothing in the act shall be construed to give t Commission jurisdiction with respect to "intrastate communicati service by wire or radio of any carrier" or "any carrier engaged in terstate or foreign communication solely through connection by rad * * * with facilities located in an adjoining State * * * of anoth carrier * * *." It would seem that the latter clauses specifica exclude both CATV relay companies and CATV's from the jurisd tion of the Commission when they do not use microwave. Howev it is argued that the intrastate relay companies using wire, ratl than microwave, are connected by radio with broadcasters in anoth State rather than with carriers in another State. The obvious answ is that at the time of enactment of the Communications Act such thin as CATV's were unheard of and that the intent of Congress express in the second subdivision of section 2 is to deny the Commissi jurisdiction over intrastate carriers which are not part of a sing integrated system and which simply carry signals emanating fr another State. The congressional intent to exclude the Commissi from regulation of intrastate facilities and operations is indicated a number of provisions in the Communications Act. In addition the restrictions of 47 U.S.C. section 152(2), a statutory denial Commission jurisdiction to regulate intrastate facilities or operatio appears in 47 U.S.C. section 214, as to communications common c riers, in 47 U.S.C. 221(b), as to telephone companies, and even in U.S.C. section 301(d), as to radio signals which do not have a dir effect on interstate communications.

However, it is not necessary to rely upon inferential constructio Examination of the entire Communications Act for a specific pro sion applicable to companies engaged in transmitting signals int state by wire discloses that only section 214, 47 U.S.C. 214, applicable. This section provides that no carrier shall construct operate a line without obtaining authority from the Commissi provided, however, that no authority from the Commission is quired for the construction or operation of "a line within a sing

ıte unless such line constitutes part of an interstate line." The tion further provides that "As used in this section the term 'line' ans any channel of communication established by the use of ap- ›priate equipment other than a channel of communication estab- ıed by the interconnection of two or more existing channels. * * *" us, by specific statutory provision, the mere fact that a CATV sys- ı or relay company is connected by radio to some other communi- ions facility does not constitute its lines a part of a channel of nmunication comprising both the out-of-State facility and the rastate facility. The company which operates by wire within a gle State is, therefore, specifically excluded from Commission isdiction by section 214. By familiar rules of statutory construc- ı such a specific and explicit exclusion prevails over any inference t might otherwise be spun out of more general language that is imed to imply jurisdiction.

The Commission memorandum on jurisdiction argues from the initions of "wire communication" and "radio communication" in U.S.C. section 153, to the conclusion that the Commission has ju- liction over CATV's because their activities may be said to come hin the scope of these definitions. This argument is wholly beside point. The section on definitions confers no jurisdiction at all. ny terms are defined in that same section, including the terms nited States," "person" and "State commission." It is obvious t the FCC does not have jurisdiction over the United States, over te commissions or over all persons. The terms defined have legal nificance only to the extent that they are used in other sections of statutes. But one will search the act in vain for any section which ressly confers jurisdiction upon the Commission in the broad terms ntioned in the memorandum on jurisdiction. Consequently, the nitions given those terms are not germane to the issue.

f the argument in the Commission's memorandum is correct, then Commission has jurisdiction not only over intrastate wire relay tems and CATV operating systems but also over television and io receivers. The argument made in the Commission memoran- m is that any instrumentality which is incidental to or used in the cess of transmitting picture or sound or which forms a connecting k in the chain of communication between the transmitting station the viewing public is subject to Commission jurisdiction. Tele- ion and radio receiving sets are just as much within this jurisdic- nal concept as CATV's and broadcasting stations. In that event "all-channel law" (Public Law 87–529, 47 U.S.C. 303(s)) was ecessary as the Commission had full authority to regulate and li- e receivers by the terms of the original Communications Act. arly, neither the Commission nor the courts have ever previously ught this to be the case. Both have continuously acted on the con- ry assumption.

The Commission itself has explicitly denied its right to control and jurisdiction over CATV's in several decisions which up to the sent time have not been specifically reconsidered or overruled. first reported decision is *Intermountain Microwave*, 24 FCC 54, pted January 30, 1958. In this case, a television broadcaster, Hill

County, objected to the grant of a microwave authority to a CA relay company. The Commission opinion said:

> Hill County is seeking to have the Commission deny a radio authorizat to a communications common carrier because the communication cir to be derived under such authorization will be utilized by subscribers v are competitors of Hill County in endeavoring to provide visual entert ment * * *. We are of the opinion that the request of Hill County n be denied * * *. In considering this problem, it must be remembered t it is possible and feasible for communications common carriers to prov program relay facilities to subscribers where no special authorizatio required from this Commission, e.g., where the carrier already has in pl properly authorized general cable, wire, or radio facilities which may be to such particular use in the ordinary course of business. Thus, to si out for special consideration and denial only those situations where construction is involved, where such new construction is specifically for purpose of providing a service to the public, when the initial or sole availing himself of service is a community television distribution syst would be arbitrary, capricious, and discriminatory. An alternative, course, would be to adopt an overall policy, rule, or condition with res to every cable, wire, or radio authorization, issued by this Commissio carriers under its jurisdiction, under both title II and title III of the C munications Act, prohibiting the rendition of the specific type of service under attack by the objectors. Such a procedure would be equally arbitr capricious, and discriminatory and unwarranted in view of our ultim determination herein.

A few months later, in *Frontier Broadcasting Company*, 24 F 251, 16 R.R. 1005 (1958) the Commission specifically pointed out t even if it held CATV systems to be common carriers they would co within the scope of section 214 of the Communications Act and, the fore, would not require Commission authority to construct or oper intrastate lines. The Commission further said that when CA systems transmitting signals by wire do not emit excessive radiat they involve no radio transmission which requires any form of lice from the Commission under the act.

Thereafter the Commission conducted an extensive inquiry and af plenary proceedings entered a report and order considering the wh subject of CATV and repeater service, 26 FCC 403, 18 R.R. 1 (1959). The following are some of the conclusions then reached a stated by the Commission:

> * * * we find no present basis for asserting jurisdiction or authority c CATV's except as we already regulate them under part 15 of our rules w respect to their radiation of energy (par. 71).
>
> * * * it would not constitute a legally valid exercise of regulatory ju diction over common carriers to deny authorization for common car microwave, wire, or cable transmission of television programs to CA systems on the ground that such facilities would abet the creation of adv competitive impact by the CATV on the construction or successful operat of local or nearby stations (par. 77).
>
> Certainly, with respect to anything more than the barring of simultane duplication, we believe this to be an unwarranted invasion of viewers' ri to get "live" programing if they are willing to pay for it. The suggested r restricting presentation of the programs of the local station's netw would appear to be cumbersome, if not completely unworkable, especi considering that many stations in small markets, including some of th covered in the record, present programs of two or even three netwo (par. 96).
>
> We have considered herein the problem, the issues raised, and sugge methods of solution. Two of the broadcasters' suggestions, both relat

1 F.C.C. 2

to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. *Since both of these steps require changes in the Communications Act*, we will shortly recommend to Congress appropriate legislation, as indicated above (par. 99). [Emphasis added.]

In 1962 the Commission, with one dissent and one abstention, issued the *Carter Mountain* decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that grant of the microwave authority to the relay company with the bringing of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was explicitly limited to this. The Commission said in its opinion: "There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant." The Commission did not consider or discuss the decisions cited above and the only comment on *Carter Mountain* on the earlier decisions is this: "To the extent that this decision departs from our views in the report and order in docket No. 12443, 26 FCC 403 (released Apr. 14, 1959), those views are modified."

The decision was appealed and affirmed by the court of appeals. In the court of appeals six issues were agreed upon between the parties and submitted to the court by stipulation. These are set forth in the appellate opinion. *Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (CADC 1963), cert. den. 375 U.S. 951 (1963). None of the issues related either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibility of extending FCC jurisdiction to companies not utilizing radio transmission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari specifically stated that no question of Commission jurisdiction over CATV's operating by wire was involved in that case. The brief stated "* * * several bills have been introduced in Congress to give the Commission direct authority over CATV's, *a question not involved here*, * * *" (FCC brief, p. 10.) [Emphasis added.]

A month after issuing its *Carter Mountain* decision, the Commission issued a unanimous order in *WSTV, Inc.* v. *Fortnightly Corp.*, 23

R.R. 184 (1962) in which it relied upon and reaffirmed the holding of the *Frontier Broadcasting* decision, and reiterated that "this Commission [is] without title II jurisdiction over the CATV system." Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system "is dismissed for failure to state a cause of action within the jurisdiction of the Commission."

In the report and order adopting rules to be imposed on CATV's through the common carriers which serve them, the Commission merely mentions the matter of jurisdiction in a footnote (footnote 5). This cavalier reference relies entirely on the authority of the *Carter Mountain* case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The *Carter Mountain* decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcast station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission (par. 8, 32 FCC 462). The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstance prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the *Carter Mountain* brief that the issue of FCC jurisdiction over CATV's was not involved, and shortly after the *Carter Mountain* decision a unanimous Commission reaffirmed that it did not have jurisdiction over the carriage of signals by CATV's. There is no reasoned Commission opinion that considers this issue and concludes that the Commission does have the jurisdiction actually exercised in the instant report and order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

The Commission memorandum cites cases like *American Trucking Assn.* v. *U.S.*, 344 U.S. 298, and *NBC* v. *U.S.*, 319 U.S. 190, to sustain jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen

y Congress is precisely one of the reasons regulatory agencies such s the Commission are created. However, this reasoning has nothing hatever to do with an issue as to the existence of jurisdiction over n economic or technical field or a particular enterprise.

A case much closer to the present situation than any cited in the ommission's memorandum is *F.P.C.* v. *Panhandle Co.*, 337 U.S. 498 1949). In that case the Supreme Court held that the FPC could not xtend its power by the kind of reasoning relied on by the FCC here, ven though the FPC was seeking to regulate a company concededly ithin its general jurisdiction but as to an aspect of the company's usiness that was not within the terms of the statutory jurisdiction. he Court said, inter alia:

> Nothing in the sections indicates that the power given to the Commission over natural-gas companies by section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.
>
> Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible mode of interpretation push powers granted over transportation and rates so as to include production * * * We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.

he Court stated that if the Commission were of the opinion that it ould have the power sought, then it was authorized to call the attenon of Congress to that fact. The reasoning adopted by the Court the *Panhandle* case applies with even greater force to the FCC in ie instant situation. Here there is not merely an inference from rlier inaction that the Commission did not believe it had the power ow asserted. Here there are clear and explicit declarations by this ommission that it does not have the power which the present majority f the Commission now claims. The only thing that has changed since ie Commission last disclaimed the jurisdiction it now asserts is the ersonnel of the Commission. That is not a proper basis for disregardg precedent and changing established legal principles. See my sepate opinion in *Assignment of Additional VHF Channel to Johnswn, Pa., etc.*, 1 R.R. 2d 1572, 1580 (1963).

Contrary to the apparent belief of the Commission majority, the ct that it might be thought desirable for the FCC to have control CATV's or their practices does not indicate that the agency does ossess such power. See *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 1952). Despite some reservations as to the wisdom and objectivity the Commission and its staff regarding CATV's, I would agree iat, as a matter of principle, the FCC should have the authority to gulate CATV's as a service closely related to broadcasting. I favor id will support appropriate congressional legislation to give the ommission jurisdiction in this field.

This position differs from the assertion of jurisdiction made by the ommission in the instant proceedings in several important respects. irst, it is founded on a deferential respect for the constitutional heme by which Congress must specifically delegate power before

it is exercised by an agency created by Congress. Second, the powe that Congress delegates is almost certainly going to be specified an limited in extent, whereas the power derived by inference from broa general statutory terms is unlimited except by the self-restraint of th Commissioners and the vigilance of the courts. Finally, it is likel that congressional hearings will illuminate this problem and tha Congress will provide some guidance to the Commission that may sug gest a better course than the one the Commission is now determine to follow.

At least part of the problem that the Commission now foresees i the proliferations of CATV's is the result of the Commission's ow past policies. In the past the Commission has adopted the same re strictive attitude toward translators and other auxiliary service that were within its jurisdiction that it now proposes to take towar CATV's. The popular demand which has been responsible for th recent rapid growth of CATV's has been largely the result of th denial of service to many areas because of the FCC strictness an reluctance in granting authority for the construction and operatio of translators and boosters. Apparently the Commission has not ye learned that the expansion of service is not to be attained by th limitation of competition and the imposition of rigorous regulatio but rather by stimulating competition and moderating regulatior The Commission can do many things to stimulate and encourage th extension and expansion of television service throughout the country but regulating the programs that can be brought into homes b CATV's and extending the Commission's jurisdiction without specifi congressional authority are not likely to help.

However, it seems to me that the most basic and important issu involved here is far more important than the interests of the broad casters, the CATV's, or even of the audience in securing broadcastin service. The basic issue involved here is whether a great Governmen agency will show reasonable respect for its own precedents and rea sonable restraint in seeking to extend the scope of its own powe Undoubtedly the independent regulatory agencies have been give great power and broad discretion in its exercise. But if democrati government is to survive, the corollary of great power and broad dis cretion must be a strong impulse of self-restraint in the exercis of such power. In the face of statutory language, the Commission' own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seem to me to be presumptuous for the Commission now to assert jurisdic tion which it has previously explicitly disclaimed. If the laws ar inadequate to cope with the problems of the moment, it is the functio of Congress to remedy that lack. There is no reason to assume tha Congress is any less responsive than the Commission to the publi interest, or that it is unable or unwilling to act if action is needed i this field at this time. I am, accordingly, compelled to dissent fron the Commission's efforts to extend its jurisdiction without specific con gressional authority.

APPENDIX B

Second Report and Order

DOCKET NO. 15971, 2 F.C.C. 2D 725

(47)

236-331 O—66——4

FCC 66-220

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	
AMENDMENT OF SUBPART L, PART 91, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE BUSINESS RADIO SERVICE FOR MICROWAVE STATIONS TO RELAY TELEVISION SIGNALS TO COMMUNITY ANTENNA SYSTEMS.	Docket No. 14895
AMENDMENT OF SUBPART I, PART 21, TO ADOPT RULES AND REGULATIONS TO GOVERN THE GRANT OF AUTHORIZATIONS IN THE DOMESTIC PUBLIC POINT-TO-POINT MICROWAVE RADIO SERVICE FOR MICROWAVE STATIONS USED TO RELAY TELEVISION BROADCAST SIGNALS TO COMMUNITY ANTENNA TELEVISION SYSTEMS.	Docket No. 15233
AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT RULES AND REGULATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS.	Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766)

SECOND REPORT AND ORDER

(Adopted March 4, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX DISSENTING IN PART AND CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. On April 23, 1965, the Commission issued a notice of inquiry nd notice of proposed rulemaking in docket No. 15971 (30 F.R. 078), which divided the proceeding into two parts. In part I the ommission reached an initial conclusion that it has jurisdiction over l community antenna television (CATV) systems, whether or not icrowave facilities are used, and proposed to extend to nonmicroave CATV systems the substantive provisions of the carriage and nduplication rules adopted for microwave-served CATVs in dock-s Nos. 14895 and 15233. *First Report and Order* in dockets Nos. 4895 and 15233, 30 F.C.C. 683; *Memorandum Opinion and Order* in ckets Nos. 14895 and 15233, 1 F.C.C. 2d 524. Part I also invited mment on various auxiliary questions affecting all CATVs which ere not resolved in dockets Nos. 14895 and 15233. These have to do ith color duplication, educational television stations, station-owned anslators, and a possible transition period before the carriage pro-

visions are made fully applicable to existing CATV systems with lin ited channel capacity (notice, pars. 33–36).

2. In part II of the proceeding the Commission initiated an inquir looking toward possible rulemaking on broader questions posed by tl trend of CATV development, including (1) the effect of CATV entr into major cities on UHF independent stations, (2) the possible nee for limitations on the distance a station's signal may be extended l CATV, (3) "leapfrogging,"[1] (4) program origination or alteration l CATV and the related question of pay-TV or combined CATV-pa TV operations, and (5) various miscellaneous questions. In paragrap 49 of part II the Commission adopted an interim policy, pending tl outcome of the proceeding, which provides that a microwave applic tion to serve a CATV system in a community with four or more cor mercial channel assignments and three or more stations in operatic (or with at least two stations in operation and one or more statio authorized or applied for) must be accompanied by a clear and fu showing that in the particular circumstances a grant would not pose substantial threat to the development of independent UHF service the area. A like showing was required for microwave facilities serve a CATV system in an "overshadowed" community where, b cause of its proximity to three or more existing stations, any new UH station would be independent in operation. In paragraph 50 of pa II, the Commission proposed an interim rule along similar lines govern nonmicrowave CATV entry into such areas.

3. Comment on part I and paragraph 50 of part II was due at a earlier date than that specified for the remaining portions of part II which, it was anticipated, would require more lengthy considerati and possibly a further notice to afford an opportunity for comment c any specific rule proposals of the Commission (notice, pars. 64, 68 Comments and reply comments on part I and paragraph 50 have nc been fully considered by the Commission. This report and order dea only with these aspects of the proceeding.

PART I. THE CARRIAGE AND NONDUPLICATION PROVISIONS

4. In proposing that the substantive provisions of the carriage a nonduplication rules governing microwave CATV systems be e tended to all CATV systems, the notice emphasized (pars. 27, 30) th two main issues were presented: (1) Whether the Commission c appropriately proceed on the basis of its present statutory authorit and (2) whether any special problems of substance or procedure a posed by rules going to nonmicrowave systems. We turn now to discussion of the first issue.

5. The threshold jurisdictional question is twofold: (*a*) Wheth the Commission has jurisdiction as a matter of law over nonmicrowa

[1] "Leapfrogging" means the distribution by the CATV system of more distant signals preference to signals of stations located much closer to the system.

[2] Comments and reply comments on pt. I and par. 50 were originally due on June 25 a July 26, 1965, respectively. By orders issued on June 16 and June 30, 1965, these tir for filing were extended to July 26 and Sept. 17, 1965. Formal comments and/or re comments have been received from the parties listed in the attached app. A. In additi a large number of informal comments or letters from members of the public have b received and placed in the docket.

CATV systems under the present provisions of the Communications Act, and (*b*) whether it would be appropriate to exercise any such jurisdiction without a legislative enactment on the subject. In the notice we concluded initially, for the reasons set forth in our memorandum on jurisdiction attached to the notice, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It further appeared to us that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave. However, we pointed up the following matters (par. 31 of the notice):

> While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (*i*) a congressional guidance as to policy and (*ii*) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

6. Following the issuance of the notice, H.R. 7715 was introduced in the House on April 28, 1965, and hearings on the bill were held before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce in May and June 1965. In the Commission's testimony concerning the bill, it was stated that the Commission did "not contemplate applying any new rules that we may enact with respect to the rest of the CATV industry until 1966; in other words, until at least after this session of Congress is over and it has had the ability to consider this problem." (Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on H.R. 7715, 89th Cong., 1st sess., p. 25.) No bill relating to CATV has been introduced in the Senate, and the 89th Congress adjourned its first session without enacting any legislation on CATV.

7. We think it appropriate, therefore, to take up without further delay part I and paragraph 50 of the rulemaking proceeding. Here we note that CATV is developing and expanding at a very rapid rate (see pars. 31–39, within). We cannot ignore the increasing risk of adverse impact on the "public interest in the larger and more effective use of radio" (sec. 303(g)) which accompanies the burgeoning CATV development. See paragraphs 116–117; part II, within. Further it is contrary to sound regulation for carriage and nonduplication to be applicable to the microwave CATV system and inapplicable to the nonmicrowave, which constitutes the other three-fourths of the industry. And, if the carriage and nonduplication provisions are to be applied to nonmicrowave systems, it would obviously minimize the disruption to the viewing public to do so as soon as possible—before a large number of incipient CATV systems commence operation and their subscribers become accustomed to service not in compliance with the rules. It would also appear to entail less hardship to the new CATV operator to commence operation under the rules than to undergo a subsequent conversion. Moreover, removal of the present uncertainty would assist local franchising authorities, as well as franchise applicants. We have received several inquiries from local authorities as to when a decision might be expected, with an indication, in some instances that action on franchise applications was being withheld pending our decision. The "introduction of as much stability as possible into the planning perspective of those affected by our regulation" is regarded by us as a "highly desirable objective" (first report and order in dockets Nos. 14895 and 15233, par. 78). For all these considerations, developed more fully within, we think it our responsibility under the Communications Act to resolve the issues in part I and paragraph 50.

A. Jurisdiction as a Matter of Law

8. While the comments filed in support of present jurisdiction outnumber those opposed,[3] there appears to be no need to review the substance of the supporting comments here. The bulk of the supporting comments either restate essentially the same matters set forth in the Commission's memorandum on its jurisdiction and authority

[3] *Supporting comments* were filed by: National Association of Broadcasters; Association of Maximum Service Telecasters, Inc.; Storer Broadcasting Co.; American Broadcasting Co.; Westinghouse Broadcasting Co., Inc.; Fuqua Industries, Inc.; WTVY, Inc.; Snyder & Associates; Western Slope Broadcasting Co.; Black Canon Broadcasting Co.; Mesa Verde Broadcasting Co.; Houston Post Co.; WKBH Television, Inc.; Bonneville International Corp.; Mobile Video Tapes, Inc.; D. H. Overmyer; Aroostook Broadcasting Corp.; Taft Broadcasting Co.; WJAC, Inc.; Springfield Television Broadcasting Corp.; Midwest Television, Inc.; West Central Broadcasting Co.; Rust Craft Broadcasting Co.; WGAL Television, Inc.; American Farm Bureau Federation; National Farmers Union; National Grange; Tri-State TV Translators Association; labor organizations affiliated with the AFL–CIO; Eastern Educational Network; and commenting jointly, television stations KHOL-TV; KOTV, KXTX, WANE-TV, WAVE-TV, WFIE-TV, WFRV, WISH-TV, WJXT, WMT-TV, WNOK-TV, WTOP-TV. *Opposition*—Commenting in opposition to jurisdiction were: National Community Television Association, Inc.; Smith & Pepper (on behalf of 150 CATV systems); Columbia Broadcasting System; National Broadcasting Co.; TV Cable Service of Abilene, Inc.; Eatron, Inc.; American Cable Television, Inc.; Meredith Broadcasting Co.; Triangle Publications, Inc.; Jerrold Electronics Corp.; International Teleprompter Corp.; Montgomery Television Association, Inc.; and Journal Co. *Other*—American Telephone & Telegraph Co. and U.S. Independent Telephone Association took no position on the jurisdictional question but requested that the carriage and nonduplication provisions be applied to CATV systems directly rather than to microwave common carriers.

notice, attachment B) or express agreement with that memorandum.[4] ince we believe that the case for jurisdiction is sufficiently set forth i our memorandum, a copy of which is attached to this document or convenient reference (attachment C), we shall discuss only the guments made in the opposition comments.

9. The comments urging a want of jurisdiction make three principal guments. It is asserted, first, that the Communications Act con- ins no provision granting the Commission authority over CATV stems. Second, it is contended that there are specific provisions in e act which show a lack of authority. And, third, it is urged that e Commission itself has repeatedly denied jurisdiction over CATV stems, that Congress is aware of and has acquiesced in this admin- trative interpretation, and that principles of statutory construction reclose the Commission from now claiming jurisdiction. We shall scuss these arguments in order.

10. The contention that the Communications Act contains no pro- sion granting the Commission authority over CATV systems takes sue with the sufficiency of the statutory base set forth in the Com- ission's memorandum (pp. 2–7). We there relied on the fact that ction 2(a) states that the "provisions of this act shall apply to all terstate and foreign communication by wire or radio * * * and to l persons engaged within the United States in such communication," id concluded that CATV systems are engaged in "communication wire," within the meaning of section 3(a), which is interstate in ture. With respect to the provisions of the act to be applied, we ated that the authority conferred by section 303(h) to issue rules tablishing the area or zone to be served by any station includes the wer to prevent infringement of the rules by "any person" (secs. 2(b) and 502 of the Communications Act), and specifically a per- n subject to the provisions of the act, and encompasses authority to ecify by rule the conditions under which the station's signal may extended beyond the prescribed service area or zone by CATV. oreover, apart from section 303(h), the general rulemaking author- y of the Commission (secs. 4(i) and 303 (f) and (r)) includes au- ority to take necessary action, not inconsistent with the act or law, prevent frustration of section 307(b) by CATV—an "interstate mmunication by wire" to which the act's provisions are applicable ecs. 2(a) and 3(a)).

11. It is asserted that these sections do not suffice to support juris- ction because it is necessary to find some specific provision of the t expressly conferring jurisdiction over the subject matter of CATV. he authorities cited in our memorandum (pp. 4–6) to the effect that r authority does not depend on a specific reference to CATV or ATV practices in the act[5] are distinguished on the ground that they

[4] While Storer Broadcasting Co. does not agree with the impact argument (Commission's morandum, pp. 4–5) as a jurisdictional base, it takes the position that the Commission w has limited jurisdiction over all CATV systems which is sufficient to support the asures proposed in pt. I and par. 50.

[5] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218–219; *United States* v. *orer Broadcasting Co.*, 351 U.S. 192, 203; *American Trucking Association* v. *United tes*, 344 U.S. 298, 309–311; *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612; *ited States* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *Houston, East and West Texas ilway Co.* v. *United States*, 234 U.S. 342; *Public Service Commission of State of New rk* v. *Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).

concern authority over unspecified practices of regulated licens rather than the power to regulate unspecified persons or busine not licensed under the act. Unless specific authority is required regulation of nonlicensees, it is argued, the Commission could uti its general rulemaking authority to regulate any business (such amusements, program producers, etc.) which has an impact on bro casting or uses communications facilities.

12. The attempted distinction, even assuming arguendo its valid does not fit the situation here. We are not presented with the quest of whether the Commission's broad powers to take action necess to carry out the provisions of the act include authority to regulat business not subject to the act merely because of some impact on, use of, interstate communications under the act.[6] CATV systems fer from most other businesses in that they are themselves enga in "interstate communication by wire," a business to which the a provisions are expressly applicable (secs. 2(a), 3(a)).[7] Moreo they physically intercept and extend television signals, and thus h a uniquely close relationship to the regulatory scheme embodied sections 303(h) and 307(b). We are not powerless to prevent fr tration of our action under those sections by persons subject to act merely because the licensing provisions of the statute are inap cable to them. Sections 312 (b) and (c) provide for the issuance a cease and desist order against "any person"—not merely any censee or permittee"—who has "violated or failed to observe any r or regulation of the Commission authorized in this act * * *."

13. It is further asserted that *Federal Power Commission* v. *P handle Eastern Pipeline Company*, 337 U.S. 498, precludes a c clusion that the general rulemaking power of the Commiss encompasses authority to take necessary action, not inconsistent w the act or law, to prevent frustration of section 307(b) and 303(by CATV. However, the *Panhandle* case is readily distinguishal That case was decided upon the basis of a specific provision in Natural Gas Act which denied the Federal Power Commission ju diction to deal with the problem there involved.[8] Section 1(b) of Natural Gas Act provides that the "provisions of this Act sl apply * * * to the sale in interstate commerce of natural gas resale * * * but shall not apply * * * to the production or gather

[6] We have not claimed plenary power to regulate any business which may have s impact on broadcasting or other interstate communication by wire or radio. In the ju dictional memorandum we stated that the "Commission clearly has no jurisdiction bowling alleys or theaters, for example * * *." Moreover, we sought and obtained spe statutory authority to regulate the manufacture of television receivers shipped in inters commerce for sale to the public (Public Law 87-529, 47 U.S.C. 303(s)). There ma instances, of course, where the Commission's regulatory power appropriately extends to s activities of persons not engaged in communication by wire or radio. But there i necessity to determine the limits or basis for such authority here.

[7] Since CATV systems fall within the definition of communication by wire and t operations are interstate in nature, it makes no difference that they are not expressly tioned by name. The act applies to "*all* interstate communication by wire or radio" to "*all* persons engaged in such communication" [sec. 2(a), emphasis added]. For matter, prior to the 1962 amendment incorporating sec. 303(s), the word "television" not appear in the act. Yet, it has long been established that the act applies to televi because it falls within the definitions of "radio communication" and "transmissio energy by radio" contained in sec. 3. *Allen B. Dumont Labs, Inc.*, v. *Carroll*, 184 F. 2d 155 (C.A. 3), *cert. den.* 340 U.S. 929.

[8] Other Federal Power Commission cases cited in the comments, *Amerada Petrol Corp.* v. *Federal Power Commission*, 334 F. 2d 404 (C.A. 8), and *Pan American Petrol Corp.* v. *Federal Power Commission*, 339 F. 2d 694, are similarly inapposite since they volved a lack of jurisdiction predicated upon a statutory exclusion.

natural gas" (52 Stat. 821, 15 U.S.C. sec. 717(b)). The court held that the transfer of gas leases fell within the exclusion as to the "production or gathering of natural gas" and hence lay outside the scope of the Power Commission's regulatory powers. In declining to find authority in the Power Commission's general rulemaking powers, the court stated that the "power to do the things appropriate to carry out the provisions of the act can hardly be taken to rescind a prohibition against certain actions" (337 U.S. at 508). By contrast, there is no provision in the Communications Act which specifically excludes CATV systems from the Commission's jurisdiction. On the contrary, section 2(a) states that the "provisions of this Act shall apply to *all* interstate communication by wire or radio * * * and to *all* persons engaged within the United States in such communication * * *. [Emphasis added.]" Moreover, *Panhandle* has been construed narrowly in a recent case arising under the Natural Gas Act, which sustained the Power Commission's jurisdiction over gas leases for resale in interstate commerce. *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 403–404.

14. The argument that the Communications Act contains language expressly excluding jurisdiction over CATV systems is predicated primarily on the provisions of section 2(b) and section 214(a) of the act. Section 2(b) states that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities located in an adjoining State * * * of another carrier * * *." Section 214(a) provides, in pertinent part, that "no carrier" shall construct or operate a line without a prior certificate from the Commission, provided, however, that no certificate is required for construction or operation of a line within a single State unless such line constitutes part of an interstate line." It further states: "As used in this section the term 'line' means any channel of communication established by the interconnection of two or more existing channels."

15. We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems. In the first place, both sections by their terms apply to "carriers" and we have repeatedly held that CATV systems are not "carriers" within the meaning of section 3(h) of the act. *Frontier Broadcasting Co.*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427–428; *WSTV, Inc.* v. *Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184; *Philadelphia Television Broadcasting Co., et al.*, FCC 65–702 (Aug. 2, 1965). Nor are television stations "carriers" under section 3(h). Moreover, even if CATV systems were to be deemed carriers, their operations are interstate in nature since they are carrying interstate television signals. A common carrier carrying television signals does not fall within the exemption in section 2(b)(1) because its physical facilities are located in only one State; it "performs an interstate communications service." *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.); *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific*

Telatronics, Inc., 4 Pike & Fischer, R.R. 145; and cf. *California Interstate Telephone Co.* v. *Federal Communications Commission*, 328 F. 2d 816 (C.A.D.C.).[9] See also, *United States* v. *American Telephone and Telegraph Co.*, 57 F. Supp. 451, 454 (S.D.N.Y.), aff'd *per curiam*, *sub nom. Hotel Astor* v. *United States*, 325 U.S. 837. By the same token a CATV system, if it were a carrier, would constitute "part of an interstate line" for purposes of section 214(a), even though its facilities were located within a single State.

16. The most vigorously pressed argument against jurisdiction is the assertion that the Commission is estopped by past disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers (see par. 28 of the notice herein). Reliance is placed on the principle of statutory construction that a consistent longstanding administrative interpretation is entitled to great weight, particularly where Congress is aware of the administrative determination and has subsequently amended the statute without changing the applicable section.[10] Whatever the force of this principle in other circumstances, we do not think that it is dispositive of the legal question of our jurisdiction here.

17. Initially, it bears noting that some of the precedents cited as establishing a consistent contrary position primarily concerned matters upon which we do not rely as a basis for jurisdiction. We have consistently held that CATV systems are not common carriers within the meaning of section 3(h), and hence do not come within the provisions of title II applicable to carriers. *Frontier Broadcasting Company*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 403, 427–428; *WSTV, Inc.* v. *Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. But we have not proposed to depart from this ruling, which has been reaffirmed since the issuance of the notice herein. *Philadelphia Television Broadcasters Co., et al.* v. *Rollins Broadcasting, Inc.*, docket No. 15926 (FCC 65–702, Aug. 2, 1965) now pending on appeal (case No. 19577, C.A.D.C.). Nor have we departed from our earlier rulings that CATVs are not engaged in "broadcasting" within the meaning of section 3(o) and are not encompassed within section 325(a). *CATV and TV Repeater Services*, 26 F.C.C. 403, 428–430. In areas closer to the claimed basis for jurisdiction, the precedents do not reflect a consistent contrary position.[11] Thus, while we initially

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[9] That the carrier in *Idaho Microwave* was carrying the signal of a television station located in another State is not of controlling significance. All television broadcasting is interstate in nature. *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Capital City Telephone Co.*, 3 F.C.C. 189, 193–194; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279. Moreover, in the case of network programing the communication link between the network and the station transmitter forms an additional part of the interstate chain of communication. *Ward, supra*, 300 F. 2d at 819.

[10] Cases cited to us in this connection include: *Hanover Bank, Ex.* v. *C.I.R.*, 369 U.S. 672, 686–687; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396–397; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *Luckenback Steamship Co.* v. *United States*, 280 U.S. 173, 183; *Commorano* v. *United States*, 358 U.S. 498.

[11] The position of Congress, if it has acquiesced in the Commission's rulings, is not clear. It is true, as set forth in the notice, par. 28, that following our decision in *CATV and TV Repeater Services*, 26 F.C.C. 403, the 86th Congress gave extensive consideration to some of the various legislative proposals on CATV submitted by the Commission and others, but enacted no legislation. Moreover, bills introduced in subsequent Congresses received no action. However, Congress also took no action after being apprised of the partial reversal of that decision in *Carter Mountain*. 29th FCC Annual Report, 1963. Congress likewise is aware of our initial conclusion as to jurisdiction in the notice herein issued on Apr. 2, 1965. Although a subcommittee of the House Commerce Committee subsequently held hearings on H.R. 7715, no committee report issued in the first session of the 89th Congress, and no legislation on CATV was considered or introduced in the Senate.

disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems (*Intermountain Microwave*, 24 F.C.C. 54; *CATV and TV Repeater Services*, 26 F.C.C. 403, 431–433), this ruling was later reversed in our *Carter Mountain* decision, 32 F.C.C. 459, which was sustained on judicial review. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951. In *CATV and TV Repeater Services*, we disclaimed plenary power, under section 303 (a), (b), (f), (g), (i), and (r), to "regulate any and all enterprises which happen to be connected with one of the many aspects of communications" (28 F.C.C. at 429)—a power which is not claimed here. However, we assumed (without deciding) that CATVs are within the scope of section 3(a) (26 F.C.C. at 428), and also found it unnecessary to pass on the question of our authority to regulate them directly because of adverse effect on broadcasting (26 F.C.C. at 431). And, finally, we have not previously ruled on the question of whether section 303(h) encompasses authority to regulate CATV.

18. More important, even if our past rulings in this troublesome area had been consistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous. *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951; *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672; *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404–406.[12] As the Supreme Court commented in the *Phillips Petroleum* case, in sustaining the Federal Power Commission's jurisdiction over the sale of gas by gas producers for resale in interstate commerce despite that agency's consistent past disclaimer of jurisdiction, "even consistent error is still error" (347 U.S. 672, 678, footnote 5). Moreover, in *United Gas Improvement* the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority on the basis of *Panhandle* (381 U.S. at 404–406). *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.).

19. As indicated in the notice (par. 28), our "jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion." However, the arguments discussed above do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention. After careful consideration of all the comments we are convinced that the case for present jurisdiction is a strong one. Accordingly, for the reasons set forth above and in our Memorandum as to jurisdiction (app. C), we conclude that CATV systems are engaged in interstate communication by wire to which the

[12] See also, *Colbeck* v. *Travellers Ins. Co.*, 370 U.S. 114, 127, footnote 15; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183; *Association of Clerical Employees* v. *Brotherhood of R. & S.S. Clerks*, 85 F. 2d 152, 156 (C.A. 7).

provisions of the Communications Act are applicable (secs. 2(a) a 3(a), 47 U.S.C. 152(a) and 153(a)). We further conclude that o statutory powers, particularly under section 4(i), 303 (f), (g), (h and (r) include authority to promulgate necessary and reasonab regulations to carry out the provisions of sections 1, 307(b), a 303(s) of the act and to prevent frustration of the regulatory sche by CATV operations, whether or not microwave facilities are us The rules proposed in part I and paragraph 50 of the notice are with our legal authority.

B. Assertion of Jurisdiction

20. We turn now to the further question of whether jurisdicti over nonmicrowave CATV should be exercised at this time. M of the comments in support of jurisdiction favored an immediate e tension of the carriage and nonduplication requirements to nonmic wave CATV systems, and the adoption of an interim policy eith along the lines proposed in paragraph 50 of the notice or of broac scope. However, some of the supporting comments and many of t opposition comments took the position that we should not exerc jurisdiction, even if present, until Congress has legislated on the su ject. It is urged that this would provide needed policy guidelin and avoid protracted litigation on the jurisdictional issue.

21. We stated in the notice (par. 31) that we would "welcome a congressional guidance as to policy, and (*ii*) congressional clarifi tion of our authority, which would lay the troublesome jurisdictio question at rest." In this report, we stress again the desirability our view of congressional guidance in this important area. But th far the congressional guidance or clarification has not been forthco ing; and in the present circumstances, our decision cannot prope turn on a desire to avoid litigation or on the hope of obtaining pol guidance in the CATV field. The Commission has not been "left large" as to the criterion to be following in performing our statut duties in the dynamic communications field. *National Broadcast Co.* v. *United States*, 319 U.S. 190, 219–220. The public interest tou stone provided by Congress afforded a sufficient standard for decision to adopt the carriage and nonduplication requirements microwave-served CATV systems in the first report and order dockets Nos. 14895 and 15233. Since the "considerations underly our conclusion that this is necessary in the public interest to av unreasonable competitive disadvantage and prejudicial effect on ex ing and potential television broadcast service apply equally" nonmicrowave CATV systems (notice, par. 27), there is likewis sufficient standard for judgment here. Finally, our action w respect to the paragraph 50 proposal is similarly dictated by "public interest in the larger and more effective use of radio" (s 303(g)).

22. Most of the comments agree that, apart from the basis jurisdiction, there is no significant difference between microwave a nonmicrowave systems. However, National Community Televis Association, Inc. (NCTA), asserts that there is no basis for assum

ney are alike. It points to no factual distinction. Rather, NCTA renews its contentions in dockets Nos. 14895 and 15233 that no adequate factfinding inquiry has been conducted, and claims further that adverse impact has not been established and cannot support an assertion of jurisdiction. In this connection, NCTA has appended to its comments the material it submitted before the House subcommittee in hearings on H.R. 7715. It urges particularly that the 15 days before and after nonduplication period is unjustified, and has no reasonable relationship to the showing of nonnetwork programing. NCTA's staff has undertaken a study to test the validity of the Commission's sample week network study (first report, pars. 104–109), and has found that the data developed by the Commission supports its conclusion that delayed programing occurs most frequently among affiliates in the mountain time zone, and there in one- and two-station markets. NCTA claims that its study of 33 mountain time zone stations with CATV penetration shows no adverse consequences (NCTA comments, exhibit A). It points in addition to specific examples of small market stations which have allegedly increased circulation and maintained the same or a higher network hourly rate since 1960, despite substantial CATV penetration of their service areas (NCTA comments, exhibits A and B).

23. While the inferences NCTA draws from its studies are sharply criticized in the reply comments of Association of Maximum Service Telecasters (AMST), we do not think it necessary or useful to set forth the contentions of each or to discuss their dispute as to individual situations. The NCTA appendixes do not differentiate between microwave and nonmicrowave CATV systems; on their face they constitute an attack on the validity of the first report and order in dockets Nos. 14895 and 15233. But the supplementary material upon which NCTA now relies as indicating a lack of past impact is similar in nature to the showing there considered at length and would not in itself warrant reversal of our conclusions.[13] Indeed, NCTA, in relying upon its showing, simply ignores the two most important grounds for our decision, namely, (*i*) the fair competition ground, and (*ii*) the economic impact ground, *based on the CATV trend in recent years.* Since this is so, it may be well to restate those grounds briefly, and to take account of current information pertinent to those grounds.

24. In the first report and order in dockets Nos. 14895 and 15233, we concluded that CATV serves the public interest when it provides program choices not locally available off the air and acts as a supplement rather than a substitute for off-the-air television service, explaining our principal reasons as follows (par. 44):

> * * * Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to *all* people of the United States on a fair, efficient, and

[13] We have decided, for the reasons set forth in pars. 47–55 below, to delete the provision for nonduplication 15 days before and after the local broadcast and to substitute a requirement for nonduplication only on the same day as the local broadcast. Thus, our resolution of this matter affords NCTA substantially the relief it has requested.

equitable basis (secs. 1 and 307(b) of the Communications Act). Thi obligation is not met by primary reliance on a service which, technically cannot be made available to many people and which, practically, will no be available to many others. Nor would it be compatible with our respon sibilities to permit persons willing and able to pay for additional servic to obtain it at the expense of those dependent on the growth of televisio broadcast facilities for an adequate choice of services.

25. Our determination to adopt the carriage and nonduplicatio requirements rested on two basic grounds: (1) That failure to carr local stations and duplication of their programs are unfair competitiv practices, which are inconsistent with the supplementary role o CATV (pars. 49–57, 76), and (2) that these requirements were nec essary to ameliorate the risk that the burgeoning CATV industr would have a future adverse impact on television broadcast service both existing and potential (pars. 58–75, 77).

26. With respect to the first ground, we found that the CATV sys tem which fails to carry the local station on its system has in practica effect cut off the station from access to CATV subscribers (par. 51) We stated (par. 57):

> As a competitive practice, the failure or refusal by a CATV system t carry the signal of a local station is plainly inconsistent with our belie that CATV service should supplement, but not replace, off-the-air televisio service. The cable system that follows such a practice offers the subscribe the benefits of additional television service at the price of blocking or im peding his access to available off-the-air signals. * * *
>
> Because it is inconsistent with the concept of CATV as a supplementar service, because we consider it an unreasonable restriction upon the loca station's ability to compete, and because it is patently destructive of th goals we seek in allocating television channels to different areas and com munities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcast ing would be entirely negligible would we consider countenancing such a practice.

27. We further pointed out that CATV, though distributing the programs of the television broadcast service, stands outside its norma program distribution process and fails to recognize the reasonable ex clusivity for which the local stations have bargained in the program market when it duplicates local programing via the signals of distant stations (pars. 52–56). We summarized our conclusion that this wa unfair and inconsistent with CATV's supplementary role as follow (par. 57):

> In light of the unequal footing on which broadcasters and CATV system now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programing via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, tha the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs. We think the basic congressional judgment underlying section 325(a) limitation on re broadcasting is the same.
>
> Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. What ever the ultimate impact of CATV competition upon the revenues and opera tion of competing stations, duplication is highly likely to affect the audience

for the specific programs involved. And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete. [Footnotes omitted.]

28. We stated that the foregoing grounds were "enough to justify gulatory action" (par. 58) and that "every station affected is en-led to appropriate carriage and nonduplication benefits—irrespec-ve of the specific damage which any individual CATV system may to the financial health of the individual station" (par. 76). But, stated, we also turned to another ground based on the economic ipact of CATV upon television broadcast development. We con-dered at some length the data and arguments before us on the ques-on of impact (pars. 58–75), finding—as in 1959—that it is "impos-ble, with the data at hand, to isolate reliably the effects of CATV mpetition from all of the other factors which operate to produce rticular financial results in differing settings" (par. 68). However, xing account of nationwide trends affecting the nature of CATV erings, the character of the markets entered, and the degree of netration achieved, we also found it plain that CATV could have substantial negative effect upon station revenues and audiences even ough we lack the tools to measure precisely the degree of impact ars. 65–69). We further found reason to believe that the impact s likely to be "more serious in the future than it has been in the st" (par. 69), and stressed our concern with the effect of explosive ATV growth in a critical period for UHF development (pars. 71–7). In sum, the Commission's judgment on this ground was based ry largely, not upon the past, but upon the trends which were al-dy evident and whose dimensions called for action now to assure public interest in the future.

29. The additional showing made in the appendixes to the NCTA nments is not directed to the above crucial considerations concern-g the trends in the CATV or UHF fields. Instead, it focuses upon rtain situations which, it claims, establish that CATV has no ad-rse impact upon television broadcasting. But each of its examples sharply disputed by AMST, which points to significant impact in me cases or sets forth other factors for the improvement in the uation of the television station in the face of CATV competition. r example, AMST notes that several stations whose network hourly te has not declined since 1960 were already at or near the minimum e for the network involved (AMST reply comments, pp. 27–28, achment A, pp. 10–14). It attributes whatever success station LUC–TV, Marquette, Mich., has enjoyed in recent years to new nagement beginning in 1960 and states that the station has suffered decline in average quarterly hour audience while local revenues have

remained stagnant (AMST reply comments, pp. 29–30, attachm t A, p. 14). AMST also points out that WBOC–TV, Salisbury, M , following a change in ownership in 1961 and the infusion of a s- stantial financial investment, extended its hours of operation, i- proved its programing, and doubled its service area through substantial power increase. (AMST reply comments, pp. 31– attachment A, pp. 15–16.)

30. It would, we think, serve no useful purpose to delve into e of those situations. For even assuming that it were possible to isol e the significance of CATV in each situation from other factors s it was feasible in the *Carter Mountain* case, first report, par. 64) t would not afford greater insight into the crucial aspect of the matte - the explosive growth and changing character of CATV and its p- sible impact upon television broadcasting in the future. And, as that aspect, events since the issuance of the first report reinforce judgment made by us upon the basis of the above-mentioned tre s in the industry. For, as the comments in this proceeding show, wi- out dispute in this respect, the trends described in paragraph 65 f the first report have become even more pronounced. We shall bri review those trends in light of their importance to our judgment

31. In the first report we relied on estimates in the Seiden rep t which were based on data compiled in 1964.[14] The Seiden rep t stated (p. 2) that there were approximately 1,300 CATV syste s serving approximately 1.2 million TV homes. The reply comme s of AMST, filed on September 17, 1965, contain the following estima s as of mid-1965 (AMST reply comments, attachment A, prepared Economic Associates, Inc., of Washington, D.C., using data fr Television Factbook (No. 35) and Television Digest):

Communities with operating CATVs	1,
Communities with CATVs franchised (but not yet operating)	
Communities with CATV applications pending	

While these figures are not tendered as precisely accurate,[15] the rapi accelerating rate of growth is confirmed in statistics given by licens s commenting on the situation within their service areas,[16] in the tr press, and in letters received by the Commission from local franchisi authorities and other members of the public.

32. In addition, the channel capacity of CATV systems is incre - ing. According to the Seiden report (pp. 2, 54) the usual CA system in 1964 delivered five signals and 85 percent of all syste s delivered between three and seven signals. However, there is indi - tion in the record that most of the new CATV systems have a chan capacity of 12 channels and many of the older systems are expandi their original capacity. The AMST reply comments (attachment contain the following table showing the cable capacity for the CATV systems for which it was able to obtain data:[17]

[14] This estimate was based on comments filed in dockets Nos. 14895 and 15233 and report submitted to us by Dr. Martin H. Seiden, entitled "An Economic Analysis of C munity Antenna Television Systems and the Television Broadcasting Industry" (Gov ment Printing Office, February 1965), hereafter referred to as the "Seiden report."

[15] There are other estimates (see par. 116, describing the Television Digest estimate), whatever the estimate, CATV growth is clearly explosive in nature.

[16] E.g., comments of Midwest Television, Inc.; West Central Broadcasting Co.; WK Television, Inc.; Mobile Video Tapes, Inc.; and Bonneville International Corp.

[17] The data were compiled from reports in Television Factbook (No. 35), Television Dig questionnaires on file at the Commission, and ARB publications.

CATVs starting	Capacity, in number of channels (including FM) [1]										
	2	3	4	5	6	7	8	9	10	11	12
1951		3		28	2	1					13
		3		26		1	1				15
		3	1	36	1	4		2	1		10
	1	5		39	3	3		2	1		20
		5		43	2	2		4			11
		3	1	30				1			10
	1			23		3	1		1		5
		2		27	1		1		1		7
			1	28			1	1			4
		2		26		2	1	1			6
				21		1			1		9
	1			25				1			16
				21	1	1	1				33
				15	1	2	2	9		3	53
July 1965				5		1	2	1			44
Totals	3	26	3	393	11	21	10	22	5	3	256

[1] Includes expansions subsequent to starting date. Limitations of the source data make it impossible to determine the original capacity of most of these systems.

expanding channel capacity is also reflected in the answers submitted to our questionnaire sent to all known CATV systems in connection with the transition period question. (See pars. 103–107, within.) It further appears that CATV activity is accelerating in areas where there is the greatest interest in UHF development. The comments of AMST list all communities or metropolitan areas where UHF stations were operating, authorized, or applied for as of July 8, 1965, and indicate the extent of colocated CATV activity (AMST comments, attachment C, table 2).[18] The results are summarized by AMST as follows (comments, p. 59):

> There are 237 UHF stations and 93 educational stations either operating or with outstanding construction permits or for which applications are pending in communities or metropolitan areas with a total population of over 112 million. The cities and metropolitan areas with CATV systems operating, pending, or applied for account for at least 85 million people. At least 145 communities or standard metropolitan areas with UHF stations operating, authorized, or applied for also have CATV activity. In 68 such communities or metropolitan areas where there are already operating CATV systems; at least 67 have CATV systems franchised but not operating, and at least 93 have CATV applications proposed.

The situation in central Illinois is described by Midwest Television, Inc. (Midwest), licensee of VHF station WCIA, Champaign, and UHF station WMBC–TV, Peoria, Ill.; and applicant for a new UHF station in Springfield, Ill.[19] Midwest states that CATV is in process of growth in virtually all of the major communities served by WCIA, including Champaign and Urbana themselves.[20] Franchise applications have been filed or proposed in at least 12 communities within the WCIA grade B service area, and CATV systems are operating under construction, or franchised in some 15 more. These 27 communities have a total population of 464,500—nearly one-half of

[18] According to AMST, table 2 is limited to the central communities or metropolitan areas where there is UHF activity, and does not include CATV activity elsewhere within the service area of a station located in the community or metropolitan area.

[19] Midwest is also the licensee of KFMB, San Diego, Calif.

[20] Champaign has one VHF and one UHF station, and is also the location of a UHF translator of a Decatur UHF station.

the total population within WCIA's grade B service area. Wi
the grade B service areas of WMBD–TV, Peoria, and of W71AE, I
west's La Salle translator, CATV is at various stages—from fran
proposals to actual operation—in at least five communities, inclu
Peoria itself (which has three operating UHF stations and a va
UHF commercial assignment). The total urban population of t
five communities is 221,294—between one-third and one-half of
total population in the grade B service areas of WMBD–TV and
La Salle translator. In Springfield (which has one operating U
station and applications pending for two new UHF stations), a
cations for CATV franchises are under active consideration in Spr
field and another community located in the grade B contour of
proposed UHF stations. The total urban population of the
cities is 92,072—approximately one-half of the total population wi
the grade B contour of Midwest's proposed new UHF station. I
west states that the proposals for CATV in Springfield, Peoria, Cl
paign, and Urbana have all been announced since April 23, 1965,
that at least eight new CATV operators filed applications for
franchises in central Illinois during the first 2 weeks of July.

35. A description of CATV growth in the Rio Grande Valle
Texas is given by Mobile Video Tapes, Inc., the licensee of KRVG-
in Weslaco-Harlingen, Tex. According to Mobile Video Tapes, W
laco has a 1960 census population of 15,649 and the population of
Harlingen-San Benito urbanized area is 61,658. It states tha
Walter Thompson Co. (*Population and Its Distribution, The Un
States Markets*, 8th ed., 1961), lists the Brownsville-Harlingen-
Benito market (which includes Weslaco) as a class "C" market,
143d market in the United States, with a population of only 151,
The ARB total net weekly circulation of KRGV, as of March 1
was only 75,100 homes. CATV franchises have been granted in
towns within its service area and other CATV systems are propo
The communities with CATV franchises, their populations, and
grade of KRVG coverage are given by Mobile Video Tapes as follo

Community	1960 census population	KROV cov
Brownsville	48,040	Grade A.
Edinburg	18,706	City Grad
McAllen	32,728	Grade A.
Mission	14,081	Grade B.
Pharr	14,106	City Grad

Mobile Video Tapes points out that this "constitutes the heart of
market—84.4 percent of the population shown by J. Walter Thom
for the entire Brownsville-Harlingen-San Benito market."

36. It appears, moreover, that there is significant CATV activit
the vicinity of fairly large cities with multiple channel assignme
The AMST comments (attachment C, tables 1A, B, and C)[21] tabu
the CATV systems in operation, franchised or applied for within

[21] Corrections to these tables were supplied in an "addendum" to the AMST comm
submitted on Aug. 12, 1965.

e A and B contours of existing or potential VHF and UHF ons in 11 areas "believed to be centers of considerable CATV vity' ": Bakersfield and Sacramento, Calif.; Orlando and St. Pe- urg, Fla.; Rockford, Ill.; Evansville and Indianapolis, Ind.; ester and Utica, N.Y.; and Columbus and Dayton, Ohio. The ex- of CATV penetration is detailed in tables IA, B, and C. All three separate figures for grade A and grade B contours, for VHF and respectively. Table IA shows the penetration in terms of num- f places in which CATV franchises have been granted or applied Table IB gives the equivalent data in terms of potential CATV holds [22] compared with the total number of households within lcast contours. Table IC converts the data in IB to percentages tal number of households within the broadcast contours.

The analysis shows that in these 11 areas there are approximately laces in which a CATV system was operating, franchised, or pro- l (as of July 8, 1965) within the grade B contours of existing or itial VHF and UHF stations located in the central community of of the 11 markets. These 230 places contain nearly 1,900,000 holds. In Bakersfield, Calif., an all UHF market, almost two- s of the potential UHF audience is already franchised to CATV ms. In Utica, N.Y., the figure is 44 percent. If already sub- d or proposed applications result in franchises, a UHF station olumbus, Ohio, would have CATVs potentially competing for 60 nt of its market and a VHF station for more than half. Existing pending CATVs in the Indianapolis area involve half the VHF et and about three-fifths of the UHF market. In Sacramento, ATV potential comes to over 40 percent of the UHF market and y half the VHF.

There is also widespread CATV activity within major cities. ttention has been called to the asserted intent of CATV interests re up "almost all American cities—small and large" and 85 per- of all television sets—40 million homes.[23] The December 1965 of Television Magazine (vol. 22, No. 12) states that franchise cations have been filed in San Francisco, Seattle, Pittsburgh, lmore, Fresno, Columbus, Tucson, Birmingham, Providence, and amento. Two of the commenting parties in this proceeding are cants for CATV franchises in Philadelphia. The comments of nbia Broadcasting System (CBS) refer to applications for V franchises in Albany and Syracuse, N.Y.; Galveston, Tex.; and rant of a CATV franchise in Wilmington, Del. D. H. Overmyer, ittee of new UHF station WDHO-TV in Toledo, Ohio, comments local authorities have granted a CATV franchise for that city the issuance of the joint notice herein. Toledo has two VHF ns, a UHF educational station, and—according to Storer Broad- tg Co., receives the signals of four Detroit-Windsor VHF stations, e air and without reception difficulty. Telerama, Inc., an appli- for a CATV franchise in Cleveland, has filed comments describing

[22] e tables use potential, rather than actual audience, i.e., the total number of house- within the broadcast contour, and the total number of households in the community CATV.

[23] dress by Milton J. Schapp, "CATV—Past, Present, Future," Dec. 8, 1964, reprinted evision Digest special supplement, vol. 4, No. 50, Dec. 14, 1964, p. 1.

its proposed cable operation for that city which has three VHF a tions, a UHF educational station, and applications pending for s new UHF facilities.[24] Taft Broadcasting Co., in a June 1965 peti to deny a microwave application (file No. 6226–C1–P–65) to bring three New York independent stations to CATV systems in the Wil Barre-Scranton area of Pennsylvania, states that in the last 6 mo 90 franchise applications have been filed in 54 communities in La awanna and Luzerne Counties. The Scranton-Wilkes-Barre are served by three UHF stations, providing three full network servic

39. The most factually detailed comments on big city CATV submitted by Midwest Television, Inc., licensee of station KFMB-T in San Diego, Calif. According to Midwest, CATV is growing great speed in the San Diego area, which is presently served by t VHF stations providing the programs of all three networks.[25] addition, construction permits are outstanding for two new comm cial UHF stations in San Diego and an application is pending f UHF educational station. Since March 1963, when the first CA system in the area was franchised, seven additional systems h been franchised. All eight CATV systems are within the grad contour of KFMB–TV, which falls within the Metropolitan Diego area; four are located in San Diego itself. While four of eight systems are not yet operative, two of these are expected to b operations momentarily. The operating CATV systems, which do not use microwave, carry the signals of all seven Los Angeles comm cial VHF stations and carry the local stations without affording duplication protection. Midwest has been unable to obtain the curr subscriber count, estimated at approximately 10,000 homes in Fe ary 1965.[26] However, its engineering personnel recently coun drops in a part of San Diego where CATV had been available only 3 months. Of the 159 homes in that area, 58 were wired CATV—and this, Midwest points out, "is an area where all t stations can be satisfactorily received" (Midwest comments, p. 24)

40. The Midwest comments also describe what it considers to be effect CATV operations of this nature have on the audience of local network-affiliated stations. Southwest Surveys, an independ research organization, conducted a survey for Midwest in June 1 interviewing 300 CATV subscribers and 300 nonsubscribers in the Diego area. Forty-three percent of the CATV subscribers had b subscribers for less than 3 months. Midwest states (comments, p that during the prime evening hours of 7:30 p.m. to 11 p.m., w most of the programs broadcast by the three San Diego area stat were network programs, the San Diego area stations accounted fo

[24] Telerama plans to carry all local stations and two Canadian stations on a full basis and to carry on a part-time basis on the remaining channels the signals of net affiliated stations in Detroit, Toledo, Erie (Pa.), and Youngstown and Akron, Ohio. W it does not propose to acquire microwave facilities to bring in Chicago and New Yo dependent stations, Telerama states that if these signals are made available to the C land area by common carrier facilities, "then Telerama may avail itself of the access to such signals." Since Telerama submitted its comments, Cleveland has grant franchise to Telerama.

[25] Midwest's station KFMB–TV is a CBS affiliate, KOGO (San Diego) is an NBC affi and the third station, XETV (located in Tijuana, Mexico, just a few miles from San Di is an ABC affiliate.

[26] San Diego Telecasters, Inc., permittee of UHF station KAAR–TV in San Diego, t mated as of Aug. 25, 1965, that there are "more than 15,000 sets now served by cabl

1. 97 percent of the total viewing time of non-CATV subscribers
nterviewed in two different areas and only 62 percent among cable
rscribers. During the hour from 9 p.m. to 10 p.m., Sunday through
Vdnesday, when each program broadcast by each of the San Diego
ia stations was simultaneously duplicated on CATV by Los Angeles
tions, 93 percent of the nonsubscribers saw them on local stations
areas only 77 percent of the cable subscribers did so (pp. 9–10).
)the cable subscribers, 49 percent reported that they viewed a San
)go channel most; 55 percent named a Los Angeles channel. Of
h nonsubscribers in two separate areas, San Diego stations were
ned by 108 and 94 percent, respectively, while Los Angeles stations
:e named by only 5 and 11 percent (id., p. 25).[27]

1. With respect to nonnetwork viewers, Midwest states that 25 per-
et of the CATV subscribers named a Los Angeles independent
tion as the channel they viewed most and only 1 and 2 percent,
pectively, of the two groups of nonsubscribers did so. More than
(percent of the CATV subscribers (as compared to 11 percent of the
nsubscribers) named at least one Los Angeles independent as one
the three stations most viewed (id., p. 26). During the period
.m. to 6 p.m., Monday through Friday, there was no duplication
any Los Angeles station of programs broadcast in San Diego and
h cable subscriber could watch any one of 10 different programs.
long nonsubscribers interviewed, 95 percent of those who watched
evision during that hour watched one of the San Diego stations.
long cable subscribers the Los Angeles stations accounted for 52
cent and the San Diego stations 48 percent (id., pp. 26–27).

2. Moreover, appended to the comments of Columbia Broadcast-
g System (CBS), which is opposed to an assertion of jurisdiction,
s further study of CATV prepared by its office of economic analysis.
e CBS study points out that there is a timespan lag before CATV
pact is felt (CBS comments, exhibit A, p. 27). This is partly be-
ise CATV penetration does not occur all at once; growth is gradual.
t CBS also states that networks react slowly to changes in station
diences and that it might take 3 to 5 years for a change in an affili-
's audience to be reflected fully in the relative network rate.
tional spot revenues and local advertising, while reacting more
ckly, would still take a considerable time. The study concludes
31) that the "true reasons for the modest impact of CATV thus
are the relatively small amount of penetration that CATVs gen-
lly have in any particular market and the considerable length of
e necessary for the effects of CATV to work themselves out." [28]

3. Like the Seiden report, the CBS study bases its discussion of
TV potential and impact on CATV systems operating or fran-
sed as of August 1964. It concludes, therefore, that CATV poten-
is limited to communities more than 40 miles from three stations
viding the service of the three networks (plus some metropolitan

[27] Percentages total more than 100 percent because some multiple answers were given.

[28] AMST argues that this timelag is not as great as CBS asserts. It states (reply comments, p. 22): "However long before an affiliate's network rate card is affected, advertisers will inevitably drop from network orders those stations which show serious audience losses, whether from CATV or any other cause. That this is the likely sequence is demonstrated by the parallel situation—network radio, which felt the impact of television by sharp decreases in station orders long before those stations' network rates were affected."

area apartment-house dwellers), an estimated 6–8 million TV ho es. However, the study recognizes (p. 14) that CATV "systems are cl rly moving closer to transmitting points" and states further (pp. 16-i):

> There is a final caveat that must be made at this point. There has see in the very recent past, and not included in the systems in our stu , a group of applications for CATV systems in communities with three ore than adequate network services which do not appear to be relat to apartment-house reception problems. Thus, applications for franchises ve been made in places like Albany, Syracuse, Galveston, Philadelphia nd Cleveland, and a franchise has just been granted in Wilmington, Del. . While these do provide alternative programing, we do not know a yet whether this added factor will be sufficient to make the systems viabl If these systems are established and thrive, it is clear that the potentia for community antenna systems far exceeds anything that we have t ed about thus far and, in fact, much of the country could ultimately be me CATV territory."

44. In view of the rapidly changing circumstances outlined al e, we can see no point in conducting a further factfinding inquiry th respect to nonmicrowave CATV as it has existed in the past. he extensive studies conducted by Dr. Fisher, Dr. Seiden, and NCTA in conjunction with dockets Nos. 14895 and 15233,[29] and further stu es of CBS and AMST in this proceeding, all concerned nonmicrow e as well as microwave CATV systems. Studies of this nature are nt of date almost before we have had time to consider them. Moreo r, they are of limited value since they cannot measure some of the m st important factors we are bound to consider. These include the cu ulative future effect of greater penetration by CATV systems fa chised or applied for but not yet in operation, the degree of suc s to be achieved by CATV systems in big cities or other well-se d areas, and the effect of the burgeoning CATV activity—if left unre ulated—on the decisions of potential applicants and existing licen s as to whether to inaugurate or improve service.[30]

45. What we said in the first report and order in rejecting NCTA's argument that regulatory action should not be taken in the absence of a showing that stations have ceased operation, or are about to ce operation, applies with equal force to its renewal of that argum nt here.[31] We stated (par. 77):

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[29] See, e.g., pars. 20 and 32 of the first report and order in dockets Nos. 14895 and 15 3, and p. 49 of the Seiden report.

[30] The CBS study further asserts (pp. 27–30) that the effects of a rise in CATV p tration with its depressing effect on station revenues are offset in large degree by the r sistent rise in advertising demand for television time. However, as AMST points t the number of stations sharing the advertising demand is also increasing as new UHF s tions stimulated by the all-channel law commence operations. Moreover, annual broad t expenses are on the average increasing apace with revenues.

[31] While the distant signal procedure adopted in pt. II will probably have some effe the trends we have been here discussing, we think that application of the carriage nonduplication requirements to all systems is still required in the public interest. F not only will this end the present unwarranted discrimination between the microwave nonmicrowave system, but it is called for on the basis of the fair competition ground, cussed in pars. 26–27. Second, as to the economic-impact ground we note that in of recent growth, there are a very substantial number of CATV systems operating on date of release of this report with the capacity to keep growing to perhaps 50–70 per of the television homes in their communities, and thus to have a cumulative effect in a such as those noted in the prior discussion (e.g., pars. 35–37). New systems will cont to come into operation under the interim procedure, and it may be important that cumulative effect of such systems, after growth to significant figures, be ameliorate some extent by the carriage and nonduplication requirement. Most important, the tant-signal procedure is of interim nature, subject to discontinuation or revision. par. 150. The carriage and nonduplication rules which we adopt here are not interi they are our best judgment of what the public interest calls for over an indefinite perio

NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy coexistence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of insuring the healthy growth and maintenance of the basic service.

6. In sum, we have concluded in the first report and order in kets Nos. 14895 and 15233 that the public interest requires that TV systems carry local stations without duplication for a reasonb period, in order to avoid unfair competitive disadvantage to and judicial effect on existing and potential broadcast service. We ae concluded herein that we have authority under the present provics of the Communications Act to extend these requirements to nonrowave systems. In view of the rapid surge in CATV growth e this proceeding was initiated, we think that our statutory obligas require us to act now in the areas we have proposed. This end the present unwarranted distinction between microwave and microwave systems, and will enable us to make the rules effective ore operations are commenced by a large number of CATV posals presently in the franchise or application stage.

C. Substantive Provisions of the Rules

7. CATV systems, as we recognized in the first report (pars. 43, and here again emphasize, have arisen in response to public need demand for improved television service and perform valuable lic services in this respect. CATV (like other auxiliary televi services) makes possible the provision of a variety of program ices, particularly the three full network services, to many persons reas with no local station and in one- and two-station markets. TV systems also afford a means of providing nonnetwork commer and educational services to many persons in areas with insufficient ulation to support local broadcast outlets of this nature. CATV ems make important contributions by providing good quality ption of color signals and improving reception of local signals in s within the predicted contours of local stations where off-the-air ption is inferior or precluded because of terrain, manmade struces, or other factors. We do not intend to deprive the public of se important benefits or to restrict the enriched programing selec-

tion which CATV makes available. Rather, our goal here is to i
grate the CATV service into the national television structure in su
way as to promote maximum television service to all people of
United States (secs. 1 and 303(g) of the act), both those who are c
viewers and those dependent on off-the-air service. The new rules
cussed below are the minimum measures we believe to be essentia
insure that CATV continues to perform its valuable supplemen
role without unduly damaging or impeding the growth of televi
broadcast service.

48. To insure effective integration of CATV within a fully de
oped television service, the new regulations will apply equally t
CATV systems, including those which require microwave licenses
those which receive their signals off the air.[32] We have caref
reexamined the CATV rules currently in effect for microwave-fed
tems, and have made some changes. The microwave rules wil
revised to reflect the new rules adopted for all systems.

49. In brief, under the new rules, a CATV system will be requi
upon request and within the limits of its channel capacity, to c
without material degradation the signals of all local television
tions within whose grade B contours the CATV system is loca
in order of priority of signal grade. A CATV system will
required, upon request, to avoid duplication of the programs of l
television stations carried on the system during the same day that s
programs are broadcast by the local stations. This nonduplica
protection, as under the existing rules, will apply to "prime ti
network programs (i.e., presented by the network between 6
11 p.m., eastern time) only if such programs are presented by
local station entirely within what is locally considered to be "pr
time." Nonduplication protection will not be afforded to progr
which are carried in black and white by the local station and
available in color from a more distant station on the CATV syst
Ad hoc consideration will be given to petitions from local televis
stations seeking a greater degree of protection than provided by
rules, or from CATV operators seeking a waiver of the rules, and
are adopting procedures to facilitate such petitions. Moreover,
Commission will continue to give full effect to private agreeme
between CATV operators and local television stations which prov
for a different type or degree of protection for the local station th
do the Commission's rules.[33]

50. Thus, the carriage requirements made applicable to all CA
systems will be substantially the same as those applied to microwa
served systems by the Commission's first report, except in cert
minor respects discussed in paragraphs 74 and 83 below. Howe
the new nonduplication rules embody two substantial changes fr
those adopted in the first report. First, the time period during wh
nonduplication protection must be afforded has been reduced fr
15 days before and after local broadcast to the single day of the lo
broadcast. Second, a new exemption from the nonduplication requi-

[32] Excluded from these rules will be those CATV systems which serve less than 50
scribers, or which serve only as an apartment-house master antenna.

[33] Private agreements will not avoid the necessity for evidentiary hearing for the
portation of distant signals into the top 100 markets (pt. II, below), though such ag
ments will be considered in our decision.

et has been added as to color programs not carried in color by
d stations. We shall discuss the nonduplication changes first
use they are of a major nature.

The nonduplication provisions

Modification of the nonduplication period.—Nonduplication at
same time that a local broadcast is being carried on the cable is
rly called for in the public interest for the reasons discussed above
in the first report. Simultaneous nonduplication protects the
of the popular network programing of most network affiliates
does not affect the time that such programing is available to the
TV subscriber. In the first report we further determined that
e measure of protection beyond simultaneous nonduplication
ld also serve the public interest on a number of grounds. We
l not repeat here the reasons set forth in the first report for that
rmination or for the further judgment that a 15-day before-and-
r period was appropriate.

. We have reconsidered the latter judgment and have decided to
e a different balance in light of the fact that the rules are now
g made applicable to a large number of existing systems and will
t their existing service to the CATV viewing public. The sys-
s which will now operate under the rules for the first time consti-
the great bulk of the CATV industry. In addition to all non-
rowave systems, they include a sizable number of microwave
TVs served pursuant to authorizations granted prior to Decem-
1963 when the interim condition procedure began. We recognize
the imposition of a 15-day before-and-after nonduplication
irement on systems which have not previously operated in this
ner would tend to substantially disrupt the viewing habits of the
TV subscribers. As NCTA points out (NCTA comments, exhibit
p. 35–38), there is no question but that large numbers of CATV
scribers have become accustomed to viewing network programs at
time they are presented by the distant affiliates. Although
ay before-and-after nonduplication was not required where timeli-
was important, and all distant city programs deleted under the
s would have been available to the CATV subscriber via the local
al at some time within the total 30-day period, the CATV viewer
ht not be able to view it on the later date of presentation by the
l station for any number of personal reasons.

. We believe it desirable to avoid disruption to the established
ing habits of the public as much as possible. Moreover, we are
ing to preserve, to the extent practicable, the valuable public con-
ution of CATV in providing wider access to nationwide program-
and a wider selection of programs on any particular day. Balanc-
all the pertinent considerations, we think that the nonduplication
od should be reduced to the same day for existing systems. Not
will this eliminate the great bulk of delayed nonduplication
ests (see par. 125, first report), but it will insure that the pro-
n is available to the CATV audience that same day and, in the
of network prime-time programs, that same evening. While
wholly eliminating any possible change in viewing time on the
ment day, this revision clearly minimizes any disruptive effect on

the CATV viewer. As an incidental benefit, we note that same nonduplication will substantially reduce the areas of possible dis between broadcasters and CATVs in complying with the rules, a this extent will facilitate ease of administration.

54. Application of a 15-day before-and-after nonduplication p sion to new systems would not, of course, cause a similar disru to established viewing habits, since the CATV subscriber would the beginning receive service in accordance with the rules. It w be possible to "grandfather" existing systems on a same-day duplication basis and make 15-day nonduplication effective on to new systems. But there are a number of countervailing argum First, even in the case of the new system, there is disruptive effe the extent that the CATV subscriber may not be able to view grams from distant stations at the times specified in his TV g (and may be unable to view them at the later date presented b local station for any number of reasons). It is our understan that it is essentially for that reason that some broadcasters, alth previously entitled under our microwave rules to 15-day before- after nonduplication protection, have requested only simultan nonduplication. Second, it is obviously preferable to have on of rules for all systems and thus to avoid the anomalous situatic millions of CATV subscribers viewing under one set of rules other millions, often neighbors in close-by communities, subjecte a different set. Under the circumstances, we think it better to pro by rule for same-day nonduplication for all systems, and to safeg the public interest in the particular instance warranting diffe treatment pursuant to the ad hoc procedures discussed in parag 97 below.

55. We also considered the question of retaining the 15-day be and-after nonduplication provision for nonnetwork program But, as we have previously recognized, and indeed stress in report (pars. 123, 131, infra), 15-day before-and-after nonduplica affords, at best, only minimal protection with respect to the prese tion by local stations of syndicated and film programing. Such graming is not presented on a nationwide simultaneous or even ne simultaneous basis. Retention of the 15-day provision for network programs alone would serve little effective purpose. St differently, the adoption of a uniform "same day" rule will not, in judgment, significantly affect the protection afforded as to nonnetv or independent programing. Rather, we have determined that must look elsewhere if we are to achieve effective relief in this res We treat the situation of the independent station in part II belo As a general approach encompassing all stations, we are proposin the Congress that it consider the question of extending the rebr cast concept of section 325(a) to CATV. It may be that regula of this nature would prove a preferable and more effective mean achieving fair recognition of the exclusivity contracts of the prog marketplace. Here again, we shall consider requests seeking n extensive protection of nonnetwork programing on an ad hoc basi

[34] With "same day" nonduplication affording substantial protection to the most p lar network programing, most network affiliated stations should be viable.

ure that the public interest is not prejudiced in the unusual situation although, as stated, we are unaware of any instance where the 15-day od afforded effective relief in this respect).

3. While conflicting considerations are presented, we believe that resolution constitutes a fair compromise. First, same-day non-lication is clearly sufficient to take care of the time zone differential blem, i.e., to preclude a CATV system, which brings programs ss either border of the mountain time zone, from duplicating most, not all, of a local station's network programs an hour or two re or after they are presented locally. Moreover, it will afford station affiliated with more than one network some leeway in pre-ing what it regards as the most attractive programs of each for benefit of the non-CATV audience (and also, the CATV audi-—see par. 115, first report) so long as such programs are pre-ed on the same day as the network presentation and prime-time grams are broadcast entirely within prime-time hours.[35] This , as stated, minimize any disruption to the CATV subscribers. In dition, we will consider requests by local stations and CATV sys-s for different treatment on an ad hoc basis, pursuant to the sum-y procedures discussed in paragraph 97, where possible, or by entiary hearing if necessary. Thus, the station which receives its work programing by mail, or the station or system which faces e other unusual problem, can bring its situation to our attention such relief as may be appropriate in the individual circumstances warranted by the public interest. Similarly, the CATV system seek a waiver of the rules. We stress, in addition, that the Com-sion will continue to give full effect to private agreements between ATV operators and local television stations which provide for a erent type or degree of protection for the local station than do Commission's rules. We believe that the above resolution fairly es the public interest. If further revisions are needed on the basis ur experience with these new provisions, we shall of course move mptly to implement such revisions.

7. Our decision to adopt same-day nonduplication makes appro-te some other revisions in the exclusivity sections of the rules. st, however, we stress those provisions which remain unchanged. shall retain the provision requiring the local station to present ne-time network programing entirely within prime-time hours in r to be entitled to nonduplication.[36] Thus, the CATV system

[35] In this connection, we note that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ and 11 hours per week, respectively. See par. 108, first report. While this amount is not insignificant and we recognize that there may be some detriment to the public if the local station in the median market curtails delayed broadcasts because of the absence of nonduplication protection, we point out that the amount of delayed broadcasts is not of too large a nature in the median market, and that we would not expect the local station to cease all delayed broadcasts in the absence of limited nonduplication protection. Moreover, the pending liberalization of our translator rules may result in greater availability of off-the-air service in one- and two-station markets.

[36] AMST has requested elimination of the exception for prime-time programs broadcast outside of prime-time hours. AMST urges that this provision is unnecessary because it is usually in the best interests of the station to carry prime-time programs in prime hours and the Commission has ample power to remedy any abuse. It is further asserted that there may be instances where a station reasonably desires, and has network consent, to carry such programs at other hours. However, a prior CATV presentation does not preclude the station from repeating the program outside of prime time if it has good reason to do so, and it is unlikely that instances of this nature would arise often enough to make the loss of exclusivity a significant problem. Since the provision is designed to insure that CATV subscribers have prime-time programs conveniently available in the hours of maximum viewing, the public interest is best served by its retention.

need not delete reception of any network program which is sched d by the network between the hours of 6 and 11 p.m., eastern time, ut which is broadcast by the station requesting deletion, in whole o in part, outside of the period which would normally be considered p ne time for the network programing in the time zone involved. 'is will insure that such programs are available to the CATV subscri rs in maximum viewing hours. We shall also retain the provision at the CATV system need not delete reception of any program a to which time of presentation is of special significance, such as a sp h or sporting event, except where the program is being simultaneo ly broadcast by the local station. And, although it is of greatly redu d significance for same-day nonduplication, we shall retain the provi n that the CATV system need not delete reception of a network p- gram if, in so doing, it would leave available for reception by s- scribers, at any time, less than the programs of two netwo s (including those broadcast by any stations whose signals are b g carried and whose program exclusively is being protected pursu t to the requirements of the rules).

58. However, there no longer appears to be any real necessity r the provisos to sections 21.712(g), 74.1033(e), and 91.559(e), i.e., th :

> (1) The system is not required to maintain the exclusivity of the netw k programing of any such station if the system carries the signal(s) of e or more equal or higher priority stations (other than a satellite or pa t of the station requesting exclusivity) which substantially duplicates e network programing of the station requesting exclusivity; and
>
> (2) The system is not required to maintain the exclusivity of the n network programing of any such station if the system carries the signa) of one or more equal or higher priority stations (other than a satellit r parent of the station requesting exclusivity) which operates in what e normally and usually considered other markets for purposes of televi n program distribution.

These provisions were grounded in the 15-day before-and-after n duplication period which protected network programs delayed s stantially beyond the date of network presentation and protec d nonnetwork programs for a total of 30 days. In view of same-d nonduplication, we shall provide simply that higher priority sign s carried on the system are entitled to exclusivity against lower prio y or more distant signals but not against signals of equal priority.[37]

59. *Color duplication.*—In the first report and order in dockets N 14895 and 15233 we decided that the public interest would be ser d by some accommodation which would permit a CATV system to du - cate the programs of a local station in color where the station tra- mits only in black and white (par. 143). However, we did not the determine whether such an exception should apply across the boa d or whether the CATV system should be required to make a thresh d showing that a certain number or percentage of its subscribers poss s color receiving sets. Comment on this question was invited in t s proceeding.

60. Most of the comments, from broadcast and CATV inter s alike, favor permitting color duplication on an across-the-board ba s.

[37] Though these modifications stem from our action in shortening the nonduplica n period, we note that changes of this nature were requested by AMST and ABC under e 15-day before-and-after nonduplication period.

No one has supported the proposed alternative of requiring a threshold showing by the CATV system. It is urged that it is in the public interest for color programing to be available to as many persons as possible, and that this should be encouraged by the Commission pursuant to section 303(g) of the act. The few comments opposed to making an exception for color claim that it is unnecessary. They assert that most stations not already equipped to present network programs in color will acquire such equipment now that all of the networks have commenced a significant degree of color transmission. It is further asserted that the exception would penalize smaller stations lacking financial resources to convert to color.

61. In light of the comments, we have decided to permit color duplication of local black and white transmissions without requiring any threshold showing by the CATV system. It may be that most stations will shortly be equipped to present network programs in color. But in that event the broadcasters have no real cause for complaint in the adoption of a provision which will not adversely affect them. We think that the exception is in the direction of encouraging the wider distribution of color programing and that it is consistent with the supplementary role of CATV. Any local station finding itself at a significant disadvantage can install equipment for the transmission of network color programs "at relatively little expense" (comments of American Broadcasting Co.), which would benefit its non-CATV viewing public. Hardship situations may be brought to the Commission for such relief as may be warranted by the station's showing. Accordingly, the rules governing microwave-served CATVs will be amended in this respect and the exception will be incorporated in the rules adopted for all systems. The exception will also apply where a local station is equipped for simultaneous color transmission of network programs, but delays a color program for later presentation on the same day by means of black and white video tapes.

62. Some of the CATV comments urge us to go further and permit duplication of local colorcasts where a CATV system makes a showing that the technical quality of the local signal is substantially inferior to another signal. While we would, of course, consider any such showing on a case-by-case basis, we have no reason to anticipate any widespread problem warranting action by rule. We expect that valid complaints of this nature will be rare. In most instances the technical quality of the local signal should be sufficiently good to permit satisfactory color reception on the cable if the CATV system and the station cooperate in good faith to accomplish this result. We would expect good-faith efforts by both to resolve any technical problem before any complaint is made to the Commission.

63. *Other changes in the nonduplication provisions suggested by the parties.*—The comments of NCTA (exhibit B, pp. 35–38) assert that last minute program changes by the local station require the CATV operator to bear the labor costs of a manually controlled switching service or to punch a new tape for the remainder of the week where an automatic switch is used. While this assertion was made in the context of the delayed nonduplication provision, we think that the broadcaster should afford the CATV sufficient advance notice of non-

duplication requests to permit the CATV system to make its prog am schedule available to subscribers and to set an automatic switc ng device only once for the entire week. Accordingly, we shall a nd section 21.712(h), 74.1033(f), and 91.559(f) to require that the ta- tion, upon request of the CATV operator, shall give notice under t se sections at least 8 days prior to the broadcast to be deleted. S ice same-day nonduplication affects principally network programs, w ch are ordinarily presented at the same time each week during the se- work season, this amendment should pose no difficulty for the stati .[38] Indeed, in most instances it would appear that such notice coul be given at the start of the network season and continued in effect til further notice occasioned by changes in the schedule of the netw rk or the local station.

64. AMST urges that the rules be modified to provide nondup a- tion protection to local stations which are not carried on the cal — either because no request has been made or because of the limited c n- nel capacity of the system. It states that carriage has no essen al relationship to nonduplication and should not be a condition of he latter. We cannot agree. If nonduplication were afforded where he local station is not carried, the CATV subscriber would, in s ne instances, be greatly inconvenienced and, much more important in others be deprived of all opportunity to view the programs invol d. See paragraph 51, first report. This is not the purpose or effec of the rules as written, nor would it serve the public interest. As et forth in paragraph 68 below, the better procedure where the syst 's channel capacity is too limited to permit full carriage of the l al station is to substitute its programs for the duplicating outside sig l. Partial carriage would retain the availability of the program to CATV subscribers and at the same time afford the station some m s- ure of protection.

65. Other changes in the nonduplication provisions requested y AMST and ABC have been rendered moot by our action in shorten g the nonduplication period to 1 day and the modifications we have m le in that connection. Accordingly, we shall not discuss their con - tions in this respect. The comments with respect to nonduplicat n of noncommercial educational stations are discussed in a separate s- tion on educational television (sec. 4 below).

2. The carriage provisions

66. We shall, as stated, apply to all CATV systems substantia y the same carriage requirements as were adopted for microwave-ser d systems in the first report.[39] Thus, within the limits of its chan l capacity, a CATV system will be required to carry the signals of l commercial and educational television stations within whose grad 3 contour the system is located, giving priority: First, to principal co- munity signals; second, to grade A signals; and third, to grade 3 signals. The CATV system need not carry the signal of any stati .

[38] It has come to our attention that the requesting station may have difficulty in gi notice where the CATV does not always carry the same signals. Where a CATV sys varies the signals carried, it should provide the local stations with a copy of the CA schedule in sufficient time to permit the station to give notice of the programs to be del

[39] There are, however, changes stemming from our resolution of the translator ques (sec. 3 below)

1) that station's network programing is substantially duplicated
one or more stations of higher priority, and (2) carrying it would,
euse of limited channel capacity, prevent the system from carrying
signal of an independent commercial station or a noncommercial
ducational station. Moreover, in cases where (1) there are two or
re signals of equal priority which substantially duplicate each other,
(2) carrying all such signals would, because of limited channel
acity, prevent the system from carrying the signal of an independ-
commercial station or a noncommercial educational station, the
em need not carry all such substantially duplicating signals, but
select among them to the extent necessary to preserve its ability to
y the signals of independent commercial or noncommercial educa-
al stations. Where a signal is required to be carried, it shall be
ried without material degradation in quality, and shall be carried in
except to the extent that nonduplication of higher priority signals
be required under the rules. Upon request of the local station,
signal shall be carried on the system on the channel on which the
ion is transmitting (where practicable without material degrada-
n) and on no more than one channel. Where a system is not carry-
the signal of a grade B or higher priority station, it shall offer and
ntain for each subscriber a switching device to allow the subscriber
hoose between cable and noncable reception, unless the subscriber
icates in writing that he does not desire this device.

7. *Modifications requested by the parties.*—Some of the parties
e requested changes in these provisions. Thus, NCTA urges that
TV subscribers see no reason why out-of-State stations should be
arded as local. It asserts that CATV systems should have the
ion to carry more distant signals originating within the same State
reference to out-of-State stations placing a grade B signal over the
mmunity. We agree that there may well be instances where the pro-
ming of stations located within the State would be of greater inter-
than those of nearer, but out-of-State stations—e.g., coverage of
itical elections and other public affairs of statewide concern. We
ognize also that there may be instances where out-of-State stations
ated in another State are of greater community interest than the
graphically nearer out-of-State stations because of closer com-
nity ties with the third State. Considerations of this nature will
accorded substantial weight as a basis for waiver of the carriage
visions.

8. In this connection, we emphasize that we intend to make every
rt, consistent with the public interest, to avoid disrupting existing
vice to the public in applying the carriage provisions of the rules to
tems now in operation.[40] Where, because of limited channel capac-
, a CATV system cannot carry all grade B signals without drop-
g a more distant signal now being carried, we shall entertain a
uest for waiver of the rules pursuant to the summary procedures
cussed in paragraph 97 below and upon the basis of the showing
cified in paragraphs 104, 106. In appropriate circumstances, waiv-

[40] As in the case of our present policy with respect to microwave systems, carriage will be required where a sufficient showing is made that a predicted signal is not in fact present in the community, or that a good signal is not obtainable because of technical deficiencies on the part of the station.

ers will be granted, which will permit the system to continue to c
the distant signal and to substitute the nearer signal only where si
taneous duplication would occur. Thus, upon such waivers the C.
viewers would continue to receive all programs to which they
accustomed, via the more distant signal when the programs are
ferent and via the local signal when the programs are the same.
systems can commence operation with a channel capacity sufficie
carry both the local and the distant signals; indeed, most new sys
now commence operation with 12-channel capacity.

69. Section 21.712(f)(2), section 74.1033(d)(2), and se
91.559(d)(2) presently provide that where a signal is required
carried, it "shall, upon request of the station licensee or permitte
carried on the system on the channel on which the station is t
mitting (where practicable without material degradation)." WJ
Inc., and WKBH Television, Inc., urge that carriage on cha
should be a matter for the station's choice. According to WJAC
station should be entitled both to insist that its signal be carrie
another channel, and to select the channel of a lower priority or
local station. AMST claims, on the other hand, that carriage
channel is extremely important and should be mandatory unless
CATV makes a compelling showing that this is not technically fea
without degradation. It states that the CATV should be requ
to take all reasonable steps to eliminate material degradation wi
may result from the CATV equipment used or inadequate installat

70. Since sections 21.712(f)(1), 74.1033(d)(1), and 91.559(d)
already provide that the "signal shall be carried without mate
degradation in quality (within the limitations imposed by the techn
state of the art)," we do not think that any change in subsection (2
called for. The requirement for onchannel carriage is only opera
upon request of the station licensee or permittee. If this result
material degradation, the station can request carriage on anot
channel. Moreover, if the channel capacity of the system is such t
some signal must suffer material degradation, the inferior sig
obviously should not be that of a higher priority station. F
report and order in dockets Nos. 14895 and 15233, paragraph
However, no reason appears why it is necessary for the station it
to select the alternative channel. So long as the requirements of
rules are met, the CATV operator should be free to decide how
channels on its cable are to be utilized.

71. AMST further asserts that the CATV system should not h
complete discretion under sections 21.712(d)(2), 74.1033(b)(2),
91.559(b)(2) to select among substantially duplicating signals of eq
grade where noncarriage of one or more is necessary to preserve
ability to carry the signals of independent commercial or noncomm
cial educational stations. It urges that the rule should be modified
set forth reasonable standards for selection, such as the respective d
tances of the stations from the community, relative signal streng
respective audiences in the community—as measured by audie
surveys, terrain considerations, and the like. We recognized in t
first report and order in Dockets Nos. 14895 and 15233, paragraph
that leaving the selection to the CATV's discretion makes possible "d

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rimination between local signals in some instances." We further tated that we would closely examine complaints of abuse, particularly vhere the CATV operator has an ownership or other interest in one of he duplicating channels. We shall also give particular consideration o any allegation that the station not carried is one with closer com- nunity ties. The criteria suggested by AMST would not do away with he necessity for case-by-case resolution of complaints. AMST con- edes (comments, p. 20) that any criteria for determining priority hould not be inflexible and that an opportunity should still be pro- ided for the submission of other data to the Commission. In the ircumstances, it seems preferable to retain the rule in its present form ntil experience in its administration demonstrates what refinements ight be needed or appropriate.

72. AMST also claims that exclusion of nearby network-affiliated tations in order to bring in distant independent stations which do not lace a grade B signal over the community of the CATV, should not e permitted since "this would drastically affect the normal off-the-air ompetitive pattern of television service" (AMST comments, pp. 20–1). This provision is admittedly a "compromise approach," recog- izing both that a CATV system owes its primary duty to the stations hat are closest and place the best signal over its community, and also hat carriage of nonnetwork signals may contribute to the diversity of s service (first report and order in dockets Nos. 14895 and 15233, par.)). The general questions of whether there should be some limit on he distance and number of nonlocal signals brought in, as well as the atter of "leapfrogging," are being considered in part II of this roceeding. Pending resolution of these matters, we shall retain the le in its present form.

73. Next, AMST asserts that the installation of a switching device hould be mandatory in all cases, whether or not the local signal is rried, so that the subscriber will not be foreclosed from off-the-air rvice where the cable system is inoperative or not operating properly. is further urged that no exception should be made when the sub- riber indicates in writing that he does not desire a switch, since the quirement could easily be avoided by a "small-print" waiver in the bscription contract. While these suggestions may have some merit, e do not think they warrant a revision of the rules. The rules are esigned to protect local stations in areas which are crucial and essen- tl to preserve and encourage service to the public. For the reasons ated in paragraph 51 of the first report, particularly that going to heer inconvenience of switching * * *," we do not view this area as e of great significance, requiring further revision.

74. A further change suggested by AMST does, however, appear warrant modification of the rules. Sections 21.712(d)(3), 74.1033)(3), and 91.559(b)(3) now provide that where a CATV system erates within the grade B or higher priority contour of both a tellite station and its parent, carriage of one will relieve the system any obligation to carry the other. AMST points out that this ould allow a CATV system in, or very near to, the same community the satellite to carry only the parent station, causing the satellite lose audience for which it may be originating some local programing-

and reducing its incentive to originate programs. It urges that sat lites should be treated like any other station in accordance with t prescribed priorities. Since satellites operate on assigned chann and possess the potential to develop into regular stations, there is strong public interest in encouraging them to do so. According sections 21.712 (d)(3) and (g)(3), 74.1033 (b)(3) and (e)(3), a 91.559 (b)(3) and (e)(3), together with the note to those sectio will be deleted.

75. And, finally,[41] AMST suggests that CATVs be required to r frain from deleting or altering any portion (including advertisin of signals carried pursuant to the rules. Such a requirement is i plicit in the carriage provisions and we would so rule upon complai The addition of an explicit provision does not appear necessary the absence of some evidence of abuse. In this connection, we n that it is asserted in the comments of NCTA that some broadcast who have requested systems to refrain from advance duplication delayed broadcasts have later presented only a portion of the progra Since the CATV system is relying exclusively upon the signal of t local station to bring the program to its subscribers, the station has obligation to present in full any program for which nonduplicati is requested. Again, upon complaint we would rule accordingly. S also paragraph 158, first report. Moreover, same-day nonduplicati will greatly reduce the likelihood of any incidents of this natu

76. Accordingly, apart from the provisions relating to satellites a the changes occasioned by our disposition of the translator questio (sec. 3 below), the carriage requirements of the new rules will be t same as the provisions now governing microwave-served systems.

3. Translators

77. Part I of the notice in this proceeding (par. 36) requested co ments on two questions concerning translators: (1) Whether CAT should be required to carry and not duplicate the signals of stati owned translators operating beyond the parent station's grade B co tour,[42] and (2) whether translators should themselves be precluc from duplicating the programs of local stations.

78. With respect to the first question, the parties have expres diverse views. The CATV interests and some of the broadcasters arg against extending any protection to translators outside the grade contour because such translators are operating outside the norm service area of the parent station, do not provide a local service possess the potential for developing into regular local stations, and relatively inexpensive to construct and operate. It is further asser

[41] AMST also asks that the definition of substantially duplicating network program (secs. 21.710(f), 74.1001(e)(6) and 91.557(f)) be modified to apply only to a situa where two or more stations are primary affiliates of the same network. While such a de tion might have been equally acceptable as an original matter, we do not think that difference between the two is significant enough to warrant redoing the rules at this po An additional proposal of AMST that the substantially duplicated concept be retai only for purposes of carriage has in effect been granted in view of the matters discusse par. 58 above.

[42] Under the rules adopted in dockets Nos. 14895 and 15233, station-owned transla located within the grade B contour are treated as extensions of the originating sta (secs. 21.710(b), 74.1001(c)(2), and 91.557(b)). Such translators will be treated the s under the new rules.

hat translators should not be protected because they may impede the stablishment of local stations.

79. AMST, Storer Broadcasting Co., NAEB, and the Farm Bureau rge, on the other hand, that all translators (including those not station wned) should be carried in order to provide an incentive for the establishment of translators. Translators, they claim, should be encouraged ecause their service is received off the air free and covers a wider area han cable service. They would exempt translators from the carriage equirement where: (1) The CATV system is carrying the translator's arent station, (2) the CATV system is within the grade B contour of station whose programing is substantially duplicated by the transtor, or (3) the translator is supplying programing which substantially duplicates that of another translator whose originating station is loser. Nonduplication protection is not sought for the asserted eason that translators do not provide a local service or possess otential for developing into regular local stations.

80. We share the view that the public interest is served by encouraging expanded use of translators to bring television service to persons n rural areas and communities not now receiving adequate local television broadcast service. Apart from the fact that translator signals re received free and reach persons outside the urbanized areas served y CATVs, one of the major recommendations of the Seiden report as that increased consideration be given to the expanded use of anslators. The report states (p. 22):

> Consideration should be given to the use of translators as a tool of structural policy. They require a substantially smaller investment than CATV and are compact, highly mobile, and can be sold in the secondary market. In general they provide the flexibility necessary in an industry in which structural policy must be kept free to adapt to technological and demographic change. Translators are ideally suited as a temporary communications medium, and their use should be required of broadcast licensees in fulfilling their obligations to the public by bringing their signal to all homes in their coverage area.

he report also recommends increased use of translators to broaden the verage of UHF stations (p. 90).

81. We have already taken a step in this direction in the report and der in docket No. 15858, issued on July 9, 1965, amending the rules to rmit 100-w VHF translators on any channel listed in the Table of ssignments unoccupied by a regular television station or satellite. he rules were also amended to permit 100-w UHF translators on all noccupied UHF channels in the Table of Assignments in lieu of the revious limitation to the upper 14 channels. In addition, we have ecently proposed to permit the use of microwave frequencies to relay rograms to translators (notice of proposed rulemaking in docket o. 16424, FCC 66–41).

82. In line with this policy, we think that CATV systems should, pon request, carry the signals of commercial and educational transl ors operating in the community of the system with 100-w or higher wer, where the system has the channel capacity to do so. Since nonrriage may effectively block the translator from access to CATV subscribers (par. 51 of the first report), the inability to reach the central ce of the community may well destroy the incentive to establish

translator service for nonsubscribers in the community and persons the surrounding areas. Moreover, we think that same-day nonduplic tion should also be afforded to translators carried on the syste Translators operating with 100 w or higher power are properly d tinguishable from other translators since they have greater potenti for development into stations, and it is particularly important th such development not be impeded by CATV operations.

83. Accordingly, we shall add a fourth priority to the three alrea listed in the carriage provisions of the rules. Fourth, all commerc and noncommercial educational translator stations operating in t community of the system with 100 w or higher power. As requested the comments, exceptions will be added to exempt CATVs from t translator carriage requirement where: (1) The CATV system carrying the originating station, or (2) the CATV system is with the grade B contour of a station carried on the system whose progra ing is substantially duplicated by the translator. The provisions the program exclusivity sections will also be appropriately amend to require same-day nonduplication upon request of a translator st tion carried on the system.

84. With respect to the second question, whether translators shou be required to refrain from duplicating local stations, our presc policies and rules are as follows: Pending the outcome of this p ceeding, we have been following a policy of conditioning UHF a VHF translator grants with the requirement that the translator, up request of any station within whose grade A contour the translat operates, refrain from duplicating the station's programs eith simultaneously or within 15 days. (*Lee Co. TV Inc.*, FCC 65–483 Pike & Fisher, R.R. 2d 257; *Report and Order in Docket No. 158* par. 12.) Under section 74.732(e)(1) of the rules, the only static owned VHF translators authorized outside the grade B contour of t parent station are high-power (100-w) VHF translators operating assignments in the Table of Assignments. Moreover, section 74.7 (e)(2) of the rules provides that a station-owned VHF transla which is intended to provide reception within the grade A contour another station will not be authorized if there is any duplicati unless the translator is intended to improve reception within t principal city contour of the parent station. However, we have waiv the provisions of section 74.732(e) (1) and (2) where a nonduplicati condition was imposed.

85. Our translator rules and policies are currently in a state of fl Part II of this proceeding (notice, pars. 61, 64) proposes a reexami tion of all of our rules and policies relating to auxiliary services to if they are holding back or encouraging a variety of off-the-air se ices. A number of measures were proposed in the comments in doc No. 14848, which were deemed beyond the scope of that proceeding b may be pertinent to this reexamination. It was suggested that multiple ownership and duopoly rules be amended to allow potent 100-w translator operators to convert these to regular stations a to encourage television station licensees to apply for them. Oth suggestions included proposals for increased power for existing tra lators on other channels; removing the restriction in section 74.

e)(1) on the use of VHF translators by television station licensees eyond their grade B contour; permitting translators to be used as elay stations (only) where the need exists; permitting multiple RF mplifiers for UHF as well as VHF translators; and permitting UHF tations to use VHF translators within their grade B contours. Moreover, AMST has recently filed a petition for a comprehensive, affirmative translator program which is being considered as a counterproposal n docket No. 14229, and will also be considered in our resolution of asic translator policies in part II of this proceeding.

86. We are not in a position to resolve these questions now. Moreover, we still lack sufficient information to determine the extent to hich the rebroadcast consent provisions of section 325(a) may in ractice limit duplication by translators.[43] In addition, if translators ere required by rule to refrain from duplication within the grade B ontours of regular stations, a question would be presented as to hether the provisions of section 74.732(e) (1) and (2) continue to erve a useful purpose or should be amended. It would be contrary o the public interest to delay a resolution of other portions of part I f this proceeding pending a thorough reexamination of the translator ules and policies. Nor does it appear advisable to undertake a partial evision of the translator rules at this point merely in order to attempt o equalize the position of translators and CATVs. In the circumtances, we think it best to defer rulemaking action until more basic ranslator policies have been established.

86a. In the meantime, we will continue to grant waivers of section 4.732(e) (1) and (2) in appropriate instances, and will condition ation-owned VHF translator grants with a requirement of same-day onduplication within the grade A contour. In view of our policy of ncouraging UHF, we will not impose any nonduplication condition n UHF translator grants for facilities to operate in an all-VHF rea. Nor do we believe it appropriate to follow any general olicy of requiring a nonduplication condition where the transtor applicant is not a broadcast licensee, e.g., a community onsored translator. It would appear unlikely that such a condition needed in, or would serve, the public interest. The rebroadcast prosions of section 325(a) may work with greater efficacy in the case f translators not owned by broadcast licensees. Further, the amount f duplication in this type of situation is not likely to be of a substanal nature, since local residents are clearly not apt to undertake ne expense and inconvenience of translator operations supported by cal assessments or donations unless a substantially different program rvice is being made available. In these circumstances, we do not ink it desirable as a general policy to place any significant barrier,

[43] Although the notice requested information on the extent to which networks and her program suppliers, through contracts or otherwise, affirmatively restrict duplication translators, no party except National Broadcasting Co. commented on this subject. BC states that since 1960 it has followed a general policy of granting consent for reoadcast of its programs provided that the translator is closer to its originating station an to any other NBC affiliate. In a few recent instances, NBC has given rebroadcast nsent where the translator operated in an area served by an NBC affiliate, but only for BC programs which were not broadcast by the local station. See also par. 53 of the st report and order; *National Broadcasting Co.*, 20 Pike & Fischer, R.R. 1013; *Millers ver Translators, Inc.*, FCC 63-504, 25 R.R. 516, 518, affirmed in *Springfield Television roadcasting Corp.* v. *F.C.C.*, 328 F. 2d 186 (C.A.D.C.).

not urgently needed, to the development of such community typ translators. We shall, of course, consider whether additional require ments are appropriate, either upon request or on our own evaluatio of a particular situation, and will make all translator grants subjec to the outcome of part II of this proceeding. We will also take int account, where warranted in individual situations, the possible dis criminatory effect of our interim translator policy upon any existin CATV system competing with the translator.

4. Educational television stations

87. The rules adopted in dockets Nos. 14895 and 15233 require th carriage of noncommercial educational stations (ETV), but do no require CATVs to refrain from duplicating their programs. W followed this course because those proceedings were primarily con cerned with commercial stations and many of the considerations dis cussed in the first report and order did not appear to be applicabl to ETV. The notice herein recognized, however, that carriage alon might not be sufficient to promote the sound growth of local educa tional stations. Information was requested in this proceeding as t the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

88. Other than educational interests, most of those commenting o this subject were against extending any nonduplication protectio to ETV, for the asserted reason that the widest possible disseminatio of educational material is in the public interest. It is further asserte that CATV competition has no economic impact on ETV because i operates on a nonprofit basis. National Educational Televisio (NET), the National Association of Educational Broadcaster (NAEB), and Eastern Educational Network (EEN) take a sharpl different view in their more extensive comments. They claim tha local educational stations, though different from commercial station have an even greater need for nonduplication and interim protectio because CATV undermines the local financial support and other loca interest which is vital to ETV operations. In this they are supporte by American Broadcasting Co., AMST, and labor unions representin employees in the broadcast, CATV, and associated talent industrie

89. EEN and NAEB stress the importance of local financial sup port to educational stations. Although Federal grants-in-aid unde Public Law 87–477 are available for the construction of educationa facilities, the operations of such stations are almost entirely dependen upon local financial support. Operating income is derived primaril from (*a*) schools and universities, (*b*) local and State government and (*c*) contributions and "subscriptions" from the general publi and donations by local industries and businesses. Members of th public and local businesses will have little or no incentive to suppor the local station if ETV is made available on the cable by CATV importation of outside educational stations. As EEN puts it (com ments, p. 12); "It is wholly unrealistic to expect that the public wi be willing to pay twice for educational service—to subscribe to CAT *and* to 'subscribe' to local ETV." Diversion of funds provided b local and area educational institutions and local and State govern ments for inschool television would be even more serious, since thes

ources generally provide over one-half of the financial support for ocal educational stations.[44] If a distant ETV signal is available on he cable, and can be fitted into local schedules of instruction, local chools and local and State governments would be much more unlikely o provide the financial support and other interest necessary to start . local educational broadcast service. This would be particularly the ase where the CATV offers to wire the urban schools "free." Unlike he local educational station, the CATV is in a position to make such n offer because it does not pay for programs or maintain expensive acilities for local program origination and it can recoup the cost of ree school service through subscription fees charged to the general ublic.

90. Should CATV activity within urbanized areas siphon off suffi- ient local financial support to preclude the establishment of a local ETV station, the loss would be keenly felt by the public. The exist- nce and viability of local educational broadcast outlets has special ignificance for ETV because the educational process is geared to local onditions and needs. Local ETV stations are more than mere fa- ilities for delivering educational programs. They are an integral art of the educational and cultural life of a community and area. his is particularly true where ETV is used for inschool instruction. ETV must plan, prepare, and schedule educational programing on ne basis of individual school and community needs, whether the asic program material is produced by the station itself or outside ources. The station also provides study guides for use by the teachers the schools. CATV cannot effectively provide this carefully planned nd prepared service by indiscriminately importing signals from dis- nt educational stations located in cities with different needs and nterests.

91. Moreover, local educational stations serve not only the schools nd populations in the immediate community; they provide service the surrounding rural area not reached by CATV. NAEB points ut (comments, p. 2):

> Indeed, it is the rural area with limited budgets, facilities, and pupil concentration which has the most pressing need for the teaching resources of educational television. The specialized language, art, music, or science teacher who cannot be supported by a rural school system can, nevertheless, be enjoyed through the pooled resources of educational television.

n this connection we note also comments filed by the American Farm ureau Federation, National Farmers Union, and National Grange ating that rural residents, who often are relatively remote from the ntertainment attractions of the city, probably more than other groups f citizens in the country, rely especially on radio and television as a ajor source of entertainment and information.[45]

92. Accordingly, the educational interests urge that ETV stations e granted nonduplication protection for a period either the same as

[44] "The Financing of Educational Television Stations," report of a study conducted by Educational Television Stations, a division of the National Association of Educational Broadcasters, p. 19 (1965).

[45] Apart from ETV, it is stated that rural residents rely especially on local broadcasts giving agricultural information, weather conditions (flood, frost, etc.), pest hazards, and current market conditions.

or much longer than that accorded to commercial stations.[46] More over, both NAEB and EEN urge the adoption of procedures to pro tect communities with educational reservations which have not ye been activated. NAEB requests that the CATV be required to notif local and area school authorities and ETV interests of its propos to bring in a distant ETV signal. In this way, NAEB states, loca ETV interests would be alerted and could bring the matter to th Commission's attention for whatever action or conditions appeare warranted in the circumstances. EEN urges the adoption of interi procedures similar to those proposed for CATV operations in majo markets in paragraphs 49 and 50 of the notice.

93. The considerations put forth by the ETV interests are nc answered by simply stating that the public interest is served by th widest dissemination of educational material. If CATV operation should prejudice the establishment of new ETV stations on the unuse reserved assignments or prevent existing stations from realizing thei full potential, the result would be a narrowing of the distribution o educational material—a loss hitting hardest persons residing in rura areas and those unable to afford CATV fees. As in the case of com mercial stations, CATV's proper role is to supplement, rather tha to supplant, local educational broadcast service. The national polic of encouraging the full development and expansion of ETV is reflecte in the grants-in-aid legislation (Public Law 87–477) and has lon been a matter of deep concern to the Commission (sixth report an order, pars. 33–49). It would be plainly inconsistent with tha policy to accord educational stations less protection than commercia stations if there is any real likelihood of prejudice flowing fro CATV importation of outside ETV signals. Considering the con tinuous financial struggle of ETV and its dependence upon local finan cial support and interest, we think that the possibility of advers effect is sufficiently strong to warrant some special protection for ETV.

94. In view of our decision to adopt same-day nonduplication fo commercial stations and since it is asserted that effective nonduplica tion protection for ETV would require a much longer period, we d not think it appropriate to adopt 15-day before-and-after nondupli cation for ETV, as requested by NAEB and ABC. There is no agree ment among the educational interests as to what time period woul be appropriate, and even an extensive nonduplication period woul not solve the problem of achieving adequate operational funds fo existing ETV stations. We believe that more effective relief to ETV can be provided by the approach discussed in the succeeding para graph, than by delayed nonduplication periods such as 15 days befor and after. Therefore, while recognizing that some measure othe than nonduplication may be more suitable for ETV, we shall amen the exclusivity provisions to include educational stations. The rule will thus apply equally to all stations in line with our conclusio (par. 54 above) that they should be the same for all systems. W will, of course, be alert to guard against the possibility that CATV may pose a more acute problem for ETV than presently appears, an

[46] The longer period is sought because of the block distribution process for the NE scheduled service and distribution patterns of regional educational networks like EEN

ould not hesitate to amend the rules should this subsequently prove ecessary. ETV interests have indicated their intention to keep us prised of any worsening developments and are encouraged to do so.

95. Perhaps the most troublesome problem raised by the ETV coments is the possibility that CATV, by bringing outside educational gnals into communities where educational assignments have not yet en activated, will siphon off enough local support to preclude the tablishment of an educational station. The policy of reserving annels for educational stations is in recognition of the fact that me time may elapse before such stations come into being. While the ants-in-aid legislation has speeded up the process in many areas,[47] e reservations still serve a needed purpose which should not be dercut. CATV provides a valuable service to schools and other bscribers by bringing in ETV which is not yet locally available. t this should not be at the expense of preventing a local service om ever being established. Accordingly, we shall adopt the suggesn of NAEB that local and area ETV interests and school authorities ceive advance notice of CATV proposals to bring in outside ETV gnals. The attached rules (app. D) require the CATV system to ve notice of its proposal to bring in a distant ETV signal, at least days prior to commencing service, to the local superintendents of hools and to the area and State educational television agencies (if ay). This will enable ETV interests in the area to make objection the CATV system where a local station is contemplated. Where a ocal ETV station is reasonably imminent and objection is made to e Commission, we would not ordinarily approve importation of the stant ETV signal unless it has been established after appropriate oceedings that this would not prejudice the establishment or mainteance of a local ETV service.

96. And, finally, it is asserted by NET and NAEB that, where an ucational signal is carried on a CATV on a channel partially used r commercial signals, the placement of commercial announcements jacent to educational material carried on CATV jeopardizes the blic image of ETV and prejudices its position with program supers and copyright owners who insist upon noncommercial presentan. However, we do not think that a sufficient basis has been shown r the relief requested, i.e., prohibiting commercial announcements jacent to educational programing or requiring CATVs to devote annels exclusively to educational programing. We cannot undertke to preserve ETV or commercial stations harmless from all conivable prejudice no matter how slight. Moreover, we are reluctant interfere with CATV operations any more than necessary in the blic interest or to impose requirements not shown to be essential. ATV systems with limited channel capacity and those carrying a ge number of commercial signals might find it difficult to devote annels exclusively to ETV. CATVs may also wish to use educaonal signals to fill in portions of commercial signals which cannot carried because of the nonduplication requirements. Moreover,

[47] The number of educational TV applicants in UHF (where most of the unused educational reservations are) has increased from 5 at the beginning of 1962 to 30 as of the end of 1965; during this period 34 more UHF educational stations went on the air.

since educational stations normally do not have as long a broadca day as commercial stations, the CATV system may wish to provic its subscribers with other material during the time that the educatio station is not broadcasting. In view of the station identification a nouncements made during the course of the educational programin it seems to us that the prejudice to the originating ETV station, if an would be minimal.

D. Procedural Matters

1. Ad hoc procedures

97. It has been suggested in the comments that the Commissic should adopt specific rules providing for summary, nonhearing proc dures to handle requests for waiver of the CATV rules or for differe treatment or affirmative relief. We think the suggestion has meri The general provision for waiver of any rule (sec. 1.3 of the rule does not afford an adequate procedure for seeking additional affirm tive relief or different treatment. Moreover, such procedures wou be useful to handle requests for rulings on complaints or disputes. W recognize that to hold hearings upon each such request relating carriage, nonduplication, and ETV, would be time consuming an burdensome to the CATV systems and stations involved, particularl those in smaller communities. In addition, while such procedur will not apply to the matter of distant signals in the top 100 market for which a showing made in evidentiary hearing is required (see pa 141 below), they could be utilized in many instances to resolve distan signal questions in the smaller markets.

98. Accordingly, we have undertaken in section 74.1109 of t attached rules to devise flexible and fair procedures which will ge erally permit expeditious processing of such requests. The procedur require a written petition with notice to interested persons and affo an opportunity for submission of comments or opposition to any r quest and for reply. Upon good cause shown, the Commission ma shorten the times specified in the rules for the filing of oppositio or reply comments. The petition and all other pleadings filed by t petitioner or interested persons must contain a detailed full showin supported by affidavit, of any facts or considerations relied upo In the case of complaints or disputes, the steps taken by the parti to resolve their problem must also be set forth. The Commission wi where possible, promptly dispose of the matter on the basis of su written submissions. However, additional procedures, such as or argument, evidentiary hearing, or further written submissions d rected to particular aspects, may be specified by the Commission they appear necessary or appropriate after consideration of t pleadings.[48] In the event that the petition involves new service CATV subscribers, the Commission will expeditiously rule on t matter, either in whole or to the extent of determining whether the

[48] Since petitions under the ad hoc procedures may involve the resolution of controvers issues which in basic fairness should be determined on the pleadings of the parties, we sh amend the ex parte rules to make them applicable to proceedings under sec. 74.1109, as w as to proceedings under sec. 74.1107. The principles discussed in par. 9 of the report a order in docket No. 15381, FCC 65–598, 1 F.C.C. 2d 49, will also apply.

ould be a stay or other temporary relief pending such additional rocedures as may be required (see par. 100 below).

Information to be filed with the Commission by existing CATV systems; notification by new CATV operations

99. Pursuant to our authority under section 403 of the Communitions Act, all existing CATV operators will be required to submit the Commission, within 30 days after the effective date of our order erein, the following information with respect to each of their CATV ystems: (*a*) The names, addresses, and business interests of all officers, irectors, and persons having substantial legal or beneficial ownership nterests in each system;[49] (*b*) the number of subscribers to each ystem both currently and as of February 15, 1966; (*c*) the television ations carried on each system; and (*d*) the extent of any existing proposed program origination by each CATV system. Any CATV ystem which is located within the predicted grade A contour of a levision station in the top 100 television markets (as ranked by RB on the basis of net weekly circulation of the largest station the market) and which carries the signal of a distant station(s) ill also be required to submit a map showing the location of its cable nes being used to serve subscribers on February 15, 1966.[50] It is ot practicable to apply the notification provisions set forth below the present operations of existing systems, and there is no compreensive or accurate listing of CATV systems available to apprise levision station licensees or permittees of all existing CATV operaons within their grade B contours. Indeed, we have noted that while te recent growth of CATV is of an impressive nature, there are conicting estimates as to the precise dimensions of that very substantial rowth. The information obtained will assist the Congress in its conideration of the Commission's legislative proposals in the CATV eld, and the Commission in its consideration of matters in part II the notice and petitions described in paragraph 149 below.

100. New CATV systems will be required to notify the licensee or rmittee of any television broadcast station within whose predicted ade B contour the system will operate and the licensee or permittee any 100 w or higher power translator located in the community the system, with a copy to the Commission, concerning the proposed eration within 60 days after obtaining a franchise or entering into lease or other arrangement to use facilities. In no event may new rvice be commenced until 30 days after notice has been given. The tice shall include the name and address of the system, identification the community to be served, the television stations to be distributed, d the estimated time for the commencement of operations. Similar tification will be required by existing systems which propose to add w distant signals (at least 30 days prior to commencing service) or extend lines into obviously new geographic areas (within 60 days ter obtaining a franchise or entering into a lease or other arrange-

[49] In stating the ownership interests in a corporation which has more than 50 voting ckholders, only those stockholders need be considered who are officers or directors or who ectly or indirectly own 1 percent or more of the outstanding voting stock.

[50] Existing systems in the markets below 100 may subsequently be required to submit a p showing the location of lines as of a specific date in connection with any petition for hoc consideration of a geographic extension into new areas.

ment to use facilities or at least 30 days prior to commencing servic where no new local authorization or contractual arrangement is re quired). In addition, as already indicated, notice to local and are educational authorities and ETV interests will be required at leas 30 days prior to commencing service where carriage of a distant ET signal is proposed. Such notification will afford the local televisio stations and other interested persons an opportunity to request carriag and nonduplication under the rules or to petition the Commission fo different requirements before service is commenced and thus avoi disruption to the public. Where a petition for ad hoc consideratio is filed with the Commission by any station, CATV system, or othe interested person within 30 days after notice, new systems and exis ing systems proposing to add new distant signals shall not commenc new service until after the Commission's ruling on the petition or o the interlocutory question of temporary relief pending further pr cedures.[51] In the event that an evidentiary hearing is required, th question of whether there should be a stay or other temporary relie pending the hearing will be expeditiously resolved prior to th hearing on the basis of the pleadings of the parties and such add tional written submissions as the Commission may request.

3. Form and enforcement of the new rules

101. Aside from the obvious distinction that nonmicrowave CATV do not file applications for licenses with the Commission or use license facilities, no special problems of substance or procedure in making th carriage and nonduplication requirements applicable to them hav been called to our attention and none is apparent to us. While th substantive requirements will therefore be the same for all system some differences in form or procedure are necessary in the case of th nonmicrowave CATVs. First, the obligations will be imposed direct on the CATV system itself, rather than taking the form of condition on microwave authorizations. Second, enforcement will be throug the cease and desist procedures set forth in section 312 (b) and (c or pursuant to section 502, of the act and will not include other san tions applicable to licensees. And, third, some change is required in th provisions requiring notification to all licensees or permittees of tel vision stations placing a grade B or better signal over the communit of the CATV system that a microwave application has been filed or request has been made of a common carrier for microwave servic (See sec. 2 above.)

4. Retention of the microwave rules

102. It is urged by American Telephone & Telegraph Co. and t U.S. Independent Telephone Association (both in comments in dock No. 15971 and in its petition for reconsideration of dockets Nos 148 and 15233) that the rules governing microwave grants should b deleted when the obligations are imposed on CATV systems direct We think it best to retain the rules conditioning microwave grants (revised herein) in their present form for a while longer, until CATV

[51] The matter of extension of lines into new geographical areas by existing systems top 100 markets is discussed in par. 149 below. As already indicated, the ad hoc pro dures do not apply to new service involving distant signals in the top 100 markets obviate the need for evidentiary hearing as set forth in pars. 141–143 below.

nerally are operating in accordance with the new rules. Pending ch compliance, we cannot make the requisite public interest finding r the issuance of the microwave licensee in the absence of a showing at the facilities will be used in accordance with the conditions. oreover, the requests of A.T. & T. and USITA are primarily ounded in the alleged burden to the common carriers, which will be bstantially alleviated in this interim period by the revisions made in e memorandum opinion and order on reconsideration in dockets Nos. 895 and 15233, 1 F.C.C. 2d 524. However, once widespread CATV mpliance with the new rules has been achieved, some modification the microwave rules would clearly appear to be appropriate and we all take action toward this end as soon as it is possible to do so.

Transition period

103. In the first report and order (par. 161) and in the notice (par.), we stated that we would consider in this proceeding the question whether there should be some kind of transition period before the rriage provisions are made fully applicable to microwave and non-icrowave systems with limited channel capacity. To obtain relevant formation, the Commission mailed a questionnaire to every known ATV operator. The questions were designed to elicit specific infor-ition with respect to the effective channel capacity of each system, e local television signals which might fall within the carriage pro-sions of the rules, and the number of channels in use for nonlocal levision signals or other purposes. Responses were received from 31 CATVs, of which 250 were microwave-served and 781 were nmicrowave.

104. Upon analysis of the responses, it appeared that less than 20 rcent of the microwave systems were not in compliance with the rriage provisions, and half of these either had the unused channel pacity to come into compliance, or, in view of plans to expand the stem, would shortly be able to comply. Less than 10 percent of the icrowave systems could not comply with the rules without having to op one or more signals currently carried. Accordingly, the Commis-on, on December 8, 1965, determined that there was no need to afford icrowave-served systems a general delay in the application of the les relating to carriage, and notified all common carrier and Business dio Service licensees serving CATVs that the rules would be effec-e on and after February 1, 1966, to renewal applications. We rther advised such licensees that the renewal application should ntain a request for waiver of the rules relating to carriage, if a iver were desired, together with the following showing:

> The request for waiver should include the petition by the CATV system that the microwave licensee seek the waiver from the Commission; and the system should include a statement that it has served a copy of that petition on any television station to be affected. The request for waiver should demonstrate the hardship to the CATV system, the disruption of service to the customers of the CATV system which would result from immediate compliance with the carriage requirements, the need for the particular length of time for which the waiver is requested, and the future plans to come into compliance. Finally, the request should state whether substitution of the local station's signal on a simultaneous-only basis will be afforded during the period for which any waiver is granted where the local station is not now carried and its programing is duplicated by a more distant signal. See *Black Hills Video Corp.*, 6 Pike & Fischer, R.R. 2d 199, at 201 (par. 9).

105. With respect to the 781 nonmicrowave systems who responde to the questionnaire, it appears that 605 are already in compliance wit the carriage requirements of the rules. An additional 87 systems hav sufficient unused channel capacity, or are expanding their capacity, an would be able to comply without having to drop any presently carrie television signal. Two systems might have to utilize a channel pres ently carrying FM radio and CATV originated programing, an 10 systems furnished insufficient information for any conclusion as t their situation. There remain 77 systems which would have to dro one or more television signals presently carried in order to add one o more television signals required to be carried by the rules.

106. Thus, as in the case of microwave systems, it appears that onl a comparatively small percentage of the nonmicrowave systems coul not comply with the carriage provisions without substituting a loca for a more distant signal. In the circumstances, we believe that ther is no need to provide for a general transition period by rule. The prob lems of individual systems will be considered on a case-by-case basis upon a request for waiver making the same showing applicable t microwave systems. Accordingly, the rules will apply immediatel to all new CATV systems commencing operations on or after thei effective date, and will apply 60 days thereafter to existing system unless a request for waiver has been filed with the Commission. Ou aim is to allow an orderly transition period for the relatively sma number of systems with limited channel capacity whose viabilit might be jeopardized by immediate application of the rules, or wher existing service to CATV subscribers would be unduly disrupted (a against the *Black Hills* type of protection (6 R.R. 2d 199, at 20 (par. 9)) during the appropriate transition period).

107. The foregoing discussion of the apparent situation with respec to carriage does not take account of 100-w translators operating in th community of the CATV. Our decision (pars. 82, 83 above) to ac cord high-power translators fourth priority may raise some additiona channel capacity problems. While this new provision will have th same effective date, waivers may be sought by microwave and non microwave systems either within the 60-day period or upon receipt o any request for translator carriage which gives rise to some problem

6. Copyright suits

108. Finally, we shall make brief mention of the copyright matte because, despite our plain statements in paragraph 159 of the firs report, there would still appear to be some confusion on the part o some persons as to the effect of our carriage and nonduplication rule upon the pending copyright disputes. We have stated that our de cision is not intended to affect in any way the pending copyright suits involving as they do matters entirely beyond our jurisdiction. W have simply taken into account the existing practices of CATV sys tems and the present inability of program suppliers to control th availability of their programs via CATV. Thus, the fact that we hav given the local station the right to have its signal carried over th CATV system (and not duplicated for a reasonable period), afford no defense to that system in a copyright suit. The station cannot

bstow broadcast or transmission rights to programing which it does rt own (or as to which it has not obtained a license to do so). See *l port on Rebroadcasting Rules*, 1 (pt. 3) Pike & Fischer, R.R. 9: 1133, 1134, 1137, where we stated in connection with rebroadcast rghts under section 325(a), that the section "may no longer accurely reflect present conditions" since most programs were not owned b the originating station who could not therefore legally grant the roroadcast permission sought. In short, if the copyright suits are cided adversely to the CATV industry, we may, as stated in the first rort, have to revise our rules.[51a] We have acted now, in light of the esent copyright situation, which would appear likely to obtain for sne substantial period of time, and without the slightest intent of aecting the determinations to be made in the pending suits.

CONCLUSION AS TO PART I

109. The foregoing are the rules which we believe to be appropriate f all CATV systems at this time. We believe that they represent afair balancing of the competing interests, and properly accommodte both industries and thus, the public interest "in the larger and nre effective use of radio" (sec. 303(g)). We recognize further revsion may be called for as we gain experience in their implementation. his docket (15971) remains open with this report designated as the sond report, and we shall revise the rules, as the public interest rquires, in our consideration of part II or upon the basis of new information or experience (and, if appropriate, after giving notice o such proposed revisions). Finally, as in the case of all rules, v shall give further guidance through the medium of rulings directed tspecific situations.

110. In light of the foregoing, we find that the public interest would b served by modification of the rules previously promulgated for ncrowave-served CATV systems and the adoption of rules governing all CATV systems, as set forth in the attached appendix D. Autority for the rules adopted herein is contained in sections 1, 2(a), 3a), 4 (i) and (j), 303, 307(b), 308, 309, 310, 319, and 403 of the Cmmunications Act of 1934, as amended.

PRT II. MAJOR MARKET, DISTANT STATIONS POLICY—PARAGRAPH 49–50 OF THE NOTICE

A. The Notice; Comments

111. In the notice, we stated (par. 49, 1 FCC 2d at p. 471):

> * * * pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the area. A like showing must be made in applications for microwave facilities to serve a

[51a] And, of course, stations will have to take into account the effect of any copyright dision in making requests for carriage under the present rules.

> CATV system in a community where, because of its proximity to anoth community (or communities) having three or more existing commerci stations (e.g., within the grade B contour of such three or more co mercial stations), any new UHF television station would be independent operation.

In paragraph 50, we specifically invited comment:

> * * * on whether the foregoing course of action as to applications befo the Commission should be extended to the nonmicrowave CATV system the same type of situation (e.g., through a rule which would prohibit t extension of the signal of any television station beyond its grade B conto into a community with the situation described above (par. 49)), withc there having been a clear and compelling showing that in the particular c cumstances there is no threat to the development or maintenance of inc pendent UHF service in the community.

112. We have considered the comments received on this importa aspect. A summary of some of the comments is set out in appendix

B. Evaluation

113. The discussion in appendix B gives some of the highlights the comments submitted on this aspect. The more detailed showin have, however, been considered, and will be referred to in the ensui discussion. While these showings are pertinent, particularly wi respect to the trends which are so important to our evaluation, they c not supply definitive answers to the problems before us; rather, th serve to point up the problems and, in the circumstances, to the proc dures called for. We shall develop the underlying considerations some length, and even with some repetition of the discussion in part because of the great importance of the matter. There are two centr grounds for our action—(1) an economic impact ground, based on t trends in the CATV and UHF fields, and (2) a fair competiti ground, based on the patently anomalous conditions under which t broadcasting and the CATV industries compete.

1. The economic impact ground

114. *The UHF trend.*—As stated in our notice, we are at a watersh in the development of UHF broadcasting. UHF broadcasting ge erally suffered a very serious setback in the 1950's and limped alo until the passage of the all-channel receiver legislation. In enacti this "unique" legislation in 1962, Congress made the judgment th development of UHF "is not only the best but the only practicable w of achieving an adequate commercial and educational system in t United States" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 4; S. Re No. 1526, 87th Cong., 2d sess., p. 7). Such a system would "perm all communities of appreciable size to have at least one television st tion as an outlet for local self-expression," provide "at least thr competitive facilities in all medium-sized communities," and ma provision "for at least four commercial stations in all large centers population" (H. Rept. at p. 3). Such a fourth station might ma possible a fourth national network or the formation of "FM-ty networks" in television, and also would be "valuable particularly f local programing and self-expression"—an important need in ma markets "because all of the available stations are network affiliates" (

let. at p. 3; S. Rept. at p. 4). Thus, as shown by the above and the opulsory sale of all-channel sets at the rate of over 9 million a year, ogress and the American public have staked a great deal on the elopment of UHF.

5. As we pointed out in the notice and our prior discussion, there very present indication that the all-channel set requirement is ng its desired effect, with greatly increased interest in UHF, icularly in the many applications filed for the larger cities. Thus, the beginning of 1962 to the end of 1965, the number of UHF mercial stations on the air increased from 85 to 100, and most gificant as an indication of the trend, the number of applications ling (with multiple applications for the same channel counted) increased from 19 to 80. There are now indications of the nning of a fourth network or of an "FM-type" network, involving F and VHF stations in some major markets. With this increased ent in UHF, we believe that the next few years will supply the ical answer to whether the congressional goal of a truly nationwide vision system employing both UHF and VHF on an effective inixed basis will be achieved. (See H. Rept. at p. 7; S. Rept. at)

6. *The CATV trend.*—The CATV trend is even more pronounced, has already been noted in our first report, paragraph 65, 38 F.C.C. age 709, and in the prior discussion (pars. 31–33). As stated, the ATV growth has been explosive and gives every indication of conning its phenomenal spurt. In 1959, there were about 550 CATV stems, in 1965 at the time of the first report, there were about 1,300 ATV systems, and today—less than a year later—it is estimated that re are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, re are 1,026 CATV franchises which have been recently granted are not yet operating (ibid.). The number of applications for achises is even larger—an estimated 1,958.[52] Clearly, there is siderable substance to the statement of the official of one of the test CATV groups, quoted in our notice (par. 39, 1 FCC 2d at p. 3 :

> The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day * * *.

7. Equally important is the changing nature of the CATV opration. In 1959, the average CATV provided three signals to its scribers; in 1965 the majority provided five or more signals (par. first report), and the average system built today has 12-channel pacity.[53] There are now 20-channel systems proposed (e.g., the old proposal in Philadelphia), with industry leaders predicting

[52] As noted, the estimates as to franchises granted and applications vary. See pars. 31, supra. NCTA reported recently that 1,500 applications for CATV permits had been in the last 12 months and that 1,200 were pending (N.Y. Times, Dec. 19, 1965). By estimate (e.g., TV Digest, AMST, NCTA), the figures are impressively large.

[53] In its reply comments (p. 18), AMST asserts that of 54 systems for which data was ilable and which began operations in 1965 (through July of 1965), only 5 were 5-nel systems; 44, or 81.5 percent were of 12-channel capacity.

that in the next 5 years "improved technology will have made the channel CATVs commonplace * * *" (Television Magazine, Dec. 1 p. 31). There is greatly increased use of microwave facilities (from 50 systems using microwave in 1959 to 250 in early 1965 to ab 450 today). The distance which signals are taken has also increa greatly (to over 665 miles). Finally, the CATV industry has shif its attention to the larger communities, and CATV franchises h been granted or are being sought in such cities as Philadelphia, Tol Cleveland, San Diego, Dayton, Baltimore, Syracuse, Albany, Sac mento, Pittsburgh, Birmingham and Fort Wayne. To quote ag the large CATV group (par. 39 of the notice):

> First, and of overriding importance, is the shift of CATV strength i new locus. The centers of the most intense CATV development now are very large cities. In the past our attention was focused on the sma markets and in these we reached about 2 percent of the Nation's televi population.
>
> But today we are in the throes of spirited competition for the develop of cities such as New York, Philadelphia, Cleveland, Birmingham, Syrac Rochester, Wilmington, Norfolk, the entire State of Connecticut, and en counties such as the 37 cities of Camden County, N.J., all of Montgon and Chester Counties, Pa., etc. * * *.

The CATV applicant believes that it can be successful in such ci because it will bring better reception (particularly as to color) a most important, the programing of important independents (e.g., three New York independents to Philadelphia).

118. It is apparent that these two trends (UHF and CATV) r a serious question. Both CATV and UHF broadcasting, for exam are entering the larger markets, most often in an effort to bring p graming that is not now available in these markets. There are least 163 communities or areas with UHF stations operating, auth ized, or applied for which also have CATV activity. In 68 s communities or areas, there are already operating CATV systems: have CATV systems franchised but not operating, and 66 have CA applications pending. In the notice, we set out as an example Philadelphia area, where there are now three commercial UHF s tions on the air (and another one authorized) and there are sev well-financed CATV applicants seeking to bring in the sig of the three New York independents. The most critical question po is how these two trends mesh in the ensuing years.

119. We have studied the comments carefully in this respect. W they give some indications (see par. 122, infra), the answer rema uncertain. On the one hand, the NCTA, relying largely on the Sei report, contends that CATV in a large community such as Philadelp can have little effect on the healthy existence of UHF stations; tha anything, CATV will aid these stations by bringing them into ho where they might not otherwise be received. But we believe that t contention has significant defects.[54] In any event, it would app

[54] The Selden report assumed "an optimum" of 50 percent penetration of the Phil phia market by the CATV (but see pars. 122–123 as to the "optimum" CATV penetrati and then, based on the fact that the three New York independent stations account f percent of the TV homes during prime time, arrived at the conclusion that there w be a diversion from the Philadelphia UHF stations due to CATV of only 61,450 homes of 1.3 million TV homes in Metropolitan Philadelphia (report, pp. 84–86). As alr noted (n. 19, notice) the report measures the diversion as against the total Philadel

a crucial consideration is whether the Seiden report is correct in lief that in the large cities, it "is not clear as to what these CATV oaoters will offer that makes them think that they gain substantial mers of subscribers in such areas" (Seiden report, p. 84). In his dment, "potential CATV markets are those areas lying 40 or more l distance from three full network signals * * *" (id. at p. 83). 1). But very important segments of the CATV industry do not r with the Seiden report. They are proposing to invest very g sums of money (including amounts such as $40 million) in their i that CATV, employing 12, 20, or even greater capacity systems, gain very substantial audiences in these large markets. The crs of such important CATV groups as Jerrold or Teleprompter ive that "almost all American cities—small and large—will be rd for television * * *" and, in the words of the top official of lprompter, "within the next decade, 85 percent of all television sn the United States may be receiving their programs by cable lr than over the air" (Television Magazine, Dec. 1965, p. 30). ther experienced CATV operator estimated more conservatively tCATV may reach 30 to 35 million households within the next cle (Broadcasting Magazine, July 26, 1965, p. 31).

. We do not accept the above statements as necessarily correct, more than we accept Dr. Seiden's assertion to the contrary. The fact is that on the record before us, it is not possible to give a itive answer to the future growth of CATV—to whether it will ive very substantial penetration in the major markets and, cor-ndingly, to what its impact will be upon UHF developments in markets.[55]

. Indications in the materials before us would appear to indicate ntial growth and substantial impact by CATV in the large

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ice, plainly ignoring the very facts upon which the analysis is based. The point is t hatever criterion is used to measure CATV impact, the same criterion should be used m sure the audience UHF would have without CATV. If, therefore, it is assumed t percent of the CATV subscriber homes would, on the average, be watching the three v ork independent stations and would therefore be diverted from the three Philadel-a HF stations, the resultant figure—61,450 homes—should be related not to the 1.3 li TV homes in Metropolitan Philadelphia, but rather to the average number of homes Mropolitan Philadelphia that would be viewing the three UHF stations if there were CTV. The audience for nonnetwork programing in Philadelphia is certainly no at than in New York (and indeed would undoubtedly be much smaller in the beginning). th efore, 9 percent of the TV homes during prime time were assumed to be the number c on the average, would be watching the three Philadelphia UHF stations, this would ill n a total average audience of less than 120,000 homes against which the impact of s of more than 60,000 homes should be measured rather than against 1.3 million TV e In short, the Philadelphia audience which would be attracted to the New York e dent stations is a very important part of the audience at which any independent la elphia UHF station must aim—a critical point ignored by the Seiden report.

Vwould also point out several other factors: (1) The potential effect on the UHF e dent becomes even more serious when markets smaller than Philadelphia are con-er (see footnote 57); (ii) it is unrealistic to assume that UHF independents in such rks will have the financial base to bid for and obtain the same amount of expensive n work film program as the New York VHF independents, with their much larger u ion base, and thus, the CATV audience for nonnetwork programing may well not di ded equally between the UHF independents and the distant VHF ones; and (iii) the c nnel system would permit the importation of the New York network stations which al also contribute to diversion of audience during the 30–45 percent of time these sta-ns re presenting nonnetwork fare.

stated, the CBS study indicated that it had not included "* * * a group of appli-io for CATV systems in communities with three more than adequate services * * * applications for franchises * * * in places like Albany, Syracuse, Galveston, la elphia, and Cleveland * * *]. If these systems are established and thrive, it is r at the potential for community antenna systems far exceeds anything that we have se about thus far and, in fact, much of the country could ultimately become CATV ri ry." (CBS comments, exhibit A, pp. 16–17.) Thus, CBS focus was on the old or a ional" CATV and not the new developing trend in the industry.

markets. Thus, Midwest Television, the licensee of a San Diego tion, submitted a study made by an independent research organizat in late June 1965, of the San Diego area, the 51st market (A ranking on net weekly circulation), with three VHF stations CATV systems which carry these stations and all seven Los Ang VHF stations without nonduplication treatment. The study i cated that the CATV systems, with a present total of roughly 10,(are adding subscribers at a rapid rate. Thus, in one section wh CATV had been available for only 3 months, more than 36 perc of the homes had already been wired for CATV; as of late June percent of the CATV subscribers interviewed had been subscril for less than 3 months (Midwest comments, dockets Nos. 15971, 14 and 15233, pp. 24, 28). But this study is obviously too fragment to be conclusive on this important question. The study also indic very considerable impact upon the local stations. See paragra 40–41, supra.[56]

123. There is no doubt as to the seriousness of the question po The new UHF stations face a difficult road; we would expect, v the passage of time and thus the build-up of all-channel sets, related endeavors, that these new operations would be successful. if a CATV, with 12- or 20-channel capacity, can obtain very subst tial numbers of subscribers in these same markets (by which we m percentages of 50 percent or over), the UHF stations might fac very difficult hurdle. The audience for nonnetwork stations is limi (about a 10-percent share in most markets in the prime time) this limited audience might be greatly reduced since very substan numbers of people interested in viewing the nonnetwork program would be watching the distant independents (e.g., those of New Y or Los Angeles). We think this follows as a matter of commonse since these established big city VHF independents certainly have ability to bid for and acquire the expensive, attractive nonnetw programing. Any gain in better reception of the UHF signals mi be far outweighed by the splintering of the limited audience for ir pendent programing. The UHF stations will in any event gai very substantial audience in these markets, through the operatio the all-channel receiver law. While the CATV might bring the little sooner or with somewhat better reception into some TV hom it would appear to do so at the cost of fragmenting greatly the limi audience interested in viewing nonnetwork programing in the pr listening hours. See note 54, analyzing the Philadelphia situation the basis of a 50-percent CATV penetration.[57] As pointed out,

[56] To the same effect, see the address of Mr. George Blechta of Nielsen at the July NCTA convention, where Mr. Blechta referred to an eastern television market "where sample indicated that one-third of the viewers are CATV subscribers and that the stations have a combined share of audience of 85 percent among non-CATV homes in trast to a share of 'less than one-half' among CATV homes." (Sponsor Magazine, Jul 1965, p. 14.)

[57] Further, Philadelphia is the fourth largest market in the country. But in sma even though still major, markets, similar analyses raise even more serious questions. In the Sacramento-Stockton market (the 27th in ARB ranking) having 300,400 TV h in the metropolitan area, 63 percent or about 189,000 metropolitan area homes on the age are watching television in prime time; without CATV, the UHF would do well t a prime-time audience of 15,000 homes. While this audience, on the basis of our perience, would normally appear sufficient to support operation, obviously, significant d sion of the audience by CATV could be a serious matter. Yet CATV systems could b in the VHF independents from San Francisco and, as we understand, from Los Angeles This example, dealing with a major market, could be multiplied many times.

or uplication provision would afford virtually no relief, since non-
et ork programing is not distributed on anything like a simultaneous
at nwide basis.[58] The rise in advertising demand for television
m is also pertinent to this question; as noted (footnote 30), there
re ountervailing considerations which, at the least, require that this
c be considered in the context of the particular situation (e.g., in
'h adelphia there are three and possibly four new stations to share
e ncreased advertiser demand). Finally, we point out that it is
ot ust a matter of causing the demise of the independent UHF sta-
o ; if these stations' revenues are substantially reduced because of
u CATV activity, so that they do not have the financial base to
r ram effectively, the result is still a detriment to the public interest
n he larger and more effective use of radio" (Communications Act,
c 303(g)). In short, the problem posed is whether, if CATV suc-
e s greatly—for example, to the 50- to 85-percent figure predicted
y s optimistic proponents—there is correspondingly a grave danger
) HF broadcasting.

14. It has been urged that we simply ignore the problem and let
v ts in the major markets decide between CATV and the UHF
r dcast stations. But for reasons already developed, such a course
old be inconsistent with our statutory responsibilities and might
a to results inconsistent with public interest in a number of respects:

(i) CATV does not now serve the rural areas, and it has not been established that it can practically do so. If CATV were to undermine the healthy development of UHF, it would mean that people in the urban or more built-up areas would be getting additional service at the expense of those in the rural areas; we think that such a result is patently inconsistent with the public interest and the act's goals.

(ii) CATV is a form of pay-TV, in the sense that one must pay to obtain the television service. There are substantial numbers of people who either cannot afford to or do not wish to pay for television.[59] If then the CATV blocks development of UHF broadcasting, it would again mean that some people would be getting additional service at the expense of those who cannot afford or are unwilling to pay for such service.

(iii) Most important, CATV does not serve as an outlet for local self-expression. It does not present local discussions, the local ministers or educators, the local political candidates, etc. If events in the major markets should establish that CATV has prevented the healthy maintenance of UHF broadcasting, it would mean that, for example, New York independents would have been substituted for Philadelphia independents. We think that would be contrary to sound allocation principles, long established in section 307(b) of the act. It would be a clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the "important needs" for "local programing and self-expression" (par. 41, notice). It would also undermine the goal of a fourth national network built upon these additional stations (par. 41, notice).

[58] Nor would extension of the UHF station's signal beyond its grade B contour by CATV systems compensate for fragmentation within that contour by CATV systems having very substantial penetration. We note that CATV systems tend to bring in the distant big city independents (since such stations constitute a better sales point in obtaining subscribers) rather than the new UHF stations. In any event, an independent's source of revenue is the local and national spot business, as to which the metropolitan area rating plays a very significant role. As shown by the above discussion, that rating could be seriously affected in the event of very substantial CATV penetration.

[59] Thus, even the CATV industry estimates that on an industrywide basis CATV systems now in existence have achieved about 55 percent level of the total number of TV homes in the markets served, and that this figure will ultimately rise to 70 percent. (Television Magazine, Dec. 1965, p. 30).

125. If the New York independents sought translators to place t
signals over the Philadelphia area, it could not seriously be arg
that we should grant such applications on the ground that while t
may be destructive of congressionally established goals, events in
market place should be allowed to give the answer. The matter is
really different here. The Commission has jurisdiction to "estab
areas or zones to be served by any station" (303(h)), to make a ".
and equitable distribution of facilities among the several States
communities (sec. 307(b)), and "to perform any and all acts, m
such rules and regulations, and issue such orders, not inconsistent v
this act, as may be necessary in the execution of its functions" (4(
If then we sit back, even though we have the jurisdiction, the author
and the responsibility to carry out the congressional policies, and
not thoroughly explore the serious question posed, we would be sim
abdicating our responsibility "to promote the larger and more effec
use of radio in the public interest" (sec. 303(g)).

126. To summarize, we have reached no final conclusion in
area—i.e., the effect of CATV development in the major market
UHF broadcasting. But we have concluded that there is a substan
problem of great significance to the public interest, which must
thoroughly explored. A critical consideration would appear to be
question of CATV's growth in the major market, since (i) if t
growth is of a high order, its impact on UHF development may be n
serious; and (ii) based on present considerations, the latter co
quence will not serve "the public interest in the larger and m
effective use of radio." In view of these conclusions, we think that
course of action is clear. We must thoroughly examine the questio
CATV entry into the major markets, and authorize such entry o
upon a hearing record giving reasonable assurance that the co
quences of such entry will not thwart the achievement of the cong
sional goals. We cannot sit back and let CATV move signals abou
it wishes, and then if the answer some years from now is that CA
can and does undermine the development of UHF, simply say, "
well, so sorry that we didn't look into the matter."

127. We have focused in the above discussion on the independ
UHF station. But as interested parties such as Storer have stat
there is also a problem with respect to the new UHF station in a mar
with two VHF stations. The UHF station does not necessa
obtain a full line of network programing in such markets; eit
initially or for a considerable period of time, it may be dependent t
very substantial extent on nonnetwork fare. Further, several par
have expressed the fear that because of CATV, such new UHF s
tions will not be able to obtain a primary network affiliation. Fina
we note that to a significant degree, whether rightly or wrong
CATV penetration would appear to have a discouraging effect on en
of new UHF stations (or on the substantial expenditures which m
be made for the high tower and power necessary for an effect
operation). Permittees of several new stations have set out t
fears of the consequence of CATV importation of distant stations fr
New York, Los Angeles, etc. To give but two examples:

(i) The permittee of the new UHF station in Sacramento has informed the Sacramento City Council that the importation of outside signals from San Francisco-Oakland and Los Angeles, as proposed, would make it impossible for the UHF station to survive (joint comments, p. 15).

(ii) [Regardless of whether Jerrold's proposed Jacksonville CATV system will be subject to carriage and nonduplication], it is your permittee's belief that should Jerrold introduce through its proposed system the programs of the three television networks, it will be impossible for WJKS-TV to obtain the network affiliation required for its survival. (Statement of Rust Craft Broadcasting Co., permittee of UHF station WJKS-TV, Jacksonville, Fla.; AMST comments, p. 71.)

The above examples are not cited at this point for the correctness of the attitude taken toward CATV penetration in the particular situation, but rather for the attitude.[60] We think it important, in view of the critical period facing UHF, that the UHF entrepreneur be given a forum for thorough exploration of this serious problem.

38. The contentions of some of the parties with respect to pay-TV are also pertinent here. Several parties (e.g., ABC, Westinghouse, AMST) have stated that CATV, particularly if it succeeds in the major cities, can readily branch out into pay-TV (for example, by providing that one channel will be "original" programing available only for a specific additional charge—a form of pay-TV somewhat akin to the Bartlesville experiment in 1957–58). The parties assert that whether or not pay-TV is desirable, it should be initiated only after full consideration in an appropriate proceeding and not "come in the back door" through CATV operations and profits based on the sale of the broadcast industry's product.

39. Whether a form of pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the growth factor, particularly in the larger cities which would naturally be the backbone of any wire-pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress) after appropriate proceedings. For, what is involved is not the strictly wire-pay-TV proposals such as recently attempted in California. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the pay-TV "fostering"), and such use of broadcast signals should be allowed only if is found to be in the public interest. We have petitions now under consideration, which seek the authorization of pay-TV on a regular basis using broadcast facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, pay-TV operations based in substantial part on use of broadcast signals is inappropriate. Since here again the critical factor is the growth of CATV in the larger cities, we think that this added reason for the policy and procedure we have adopted, since that procedure will be especially applicable to such cities. We intend to explore thoroughly the relationship, if any, of proposed CATV operating in the larger markets and the development of pay-TV in that market. This is a matter which is also involved in part II of

[60] We note also that the contrary opinion has been expressed by some new UHF entrepreneurs (namely, that CATV operation will aid, rather than hurt them).

this proceeding, and will be the subject of a specific legislative rec mendation of the Commission. See paragraph 153, infra.

130. We believe that the foregoing discussion, showing the seri question posed by the potential effect of very substantial CA development upon UHF development and the possible adverse c sequences to the public interest, demonstrates the need for the ma market, distant signals policy which we have adopted. Before cussing that policy (see pt. 3, infra), we shall turn to a second gro which also, in our judgment, supports the need for the policy.

2. Fair competition

131. We have previously discussed this "fair competition" gro in connection with the nonduplication requirement. See first rep paragraphs 52–57, 28 F.C.C. 683, 703–706. That discussion, which not be fully repeated, is pertinent here. As shown, the CATV ind try is growing at a tremendous pace, with a changing nature (en into major markets, with 12- or 20-channel systems, bringing the sign of big city independents such as those of New York and Los Angele If the CATV should achieve substantial penetration of these co munities (50 percent or over), the result might be most serious the new UHF independents in these same areas. This points u critical consideration—that the nonduplication requirement will be virtually no assistance, since what is involved is the establishment a healthy maintenance of *independent* stations, and nonnetwork syn cated or film programing is not distributed on a simultaneous nati wide basis. We therefore shall reexamine the fair competit considerations in the context of the present problem—the CATV a UHF trends and the need to develop a policy or procedure because these trends.

132. A television station normally obtains the right to exhibit n network programs by outright payments to program suppliers, fr whom the station usually secures the exclusive right to exhibit programs within a particular geographical area and for a particu length of time. This exclusivity reflects the judgment that presen tion by others of a program such as a feature film within the statio market within some period of time obviously reduces the audience a the value of the program to the station. As we noted, the amount a kind of exclusivity that can be created is restricted by the antitr laws. But those laws permit the creation of substantial exclusivity a normal incident of the program distribution process, and this exc sivity is maintained, in large part, through the operation of secti 325 of the Communications Act, which forbids the rebroadcasting any station's signal without the consent of the originating station.

133. We have pointed out how the CATV system presently sta outside of the above program distribution process (pars. 54–55, f report, 38 F.C.C. at p. 704):

> [The CATV] has not been found subject to the requirements of sect 325. [footnote omitted] It does not compete for network affiliation, nor access to syndicated programs, feature films, or sports events. It is not c cerned with bidding against competing broadcasters for the right to exhi these programs nor with bargaining with program suppliers for time a territorial exclusivity. Moreover, because the distant station whose sig

is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the snbject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

34. The anomalies which result from this situation are even more nrked in the case of the independent station, particularly in light of th recent CATV trend. Procuring attractive programing which will nterest viewers is, of course, the most vital concern of the new UHF nependents. For example, such stations may bid for and obtain exlusive rights to an attractive feature film package. No other sta-in in the same market could show these films—but a CATV system, wich never entered the bidding, might well bring in these same films fm a distant market. If the CATV reaches very significant propor-tins—50 percent or more, the result is the loss of the exclusive right fc which so much was paid and upon which so much may have been sked. And here we stress again that without the financial sustenance fm entertainment programs, a station has no adequate economic base cerve as an outlet for local expression for all the people in its service ua.

35. When the situation is viewed on an overall basis, rather than fm the viewpoint of individual programs, the result is equally anom-dus. The CATV seeks to secure as great a number of subscribers spossible in these major markets, aiming for a figure well over 50 pcent if possible. Since the people in these markets have three full nework services, it seeks to attract such a large number of subscribers, n large part, by bringing in the independent programing of distant ni city stations such as the New York or Los Angeles independents. Ad it obtains such programing by simply paying a common carrier toring to it the signals of these distant stations (or by itself erecting tall antenna on an appropriate high elevation to receive the signals ul then relay them with suitable amplification along the way to the scriber). The new UHF station also seeks to attract as wide an udience as possible in these same markets by bringing in attractive nnetwork programing. But the UHF station cannot, either by ms of a common carrier, its own microwave relay, or a tall antenna, lide that the best way to obtain such programing is simply to bring n in whole or in part, the programing of the New York independ-rs. The established distribution process given congressional recog-nion in section 325(a), proscribes such conduct. (See letter to Mr. Mrtin E. Firestone, dated Dec. 16, 1965, FCC 65-1107.)[61] Both the

[61] As another example, in 1965, station KWOA desired to rebroadcast the signal of station WCCO, to present the play-by-play broadcasts of the Minnesota Twins' baseball games. Station WCCO refused rebroadcast consent, largely because it placed a good signal into the ar in question. This Commission determined that in view of WCCO's response and the particular circumstances, no action was called for. See letter to Mr. James J. Wychor, dated July 22, 1965.

broadcaster and the CATV thus have the same objective—providi as large a segment of the public as possible in these major mark with access to nonnetwork programs. The question therefore ari why the CATV should operate under one set of competitive rules a the broadcaster under an entirely different set. On its face, this co petitive situation would appear to be a most unfair one.

136. Illustrations in the sports area further point up this anomal situation and are particularly pertinent in view of the importance sports programing, both to the CATV and broadcasting. The bro cast station (or its network) bids for the right to exhibit spo programing (see, e.g., $37.6 million bid for CBS for the 2-year rig to show NFL football games; Broadcasting Magazine, Jan. 3, 1965, 124); even then, those rights are at times circumscribed by blacko requirements (during home games), and other conditions permitted Congress or the antitrust laws. See, e.g., Public Law 87–331. T broadcaster must operate in accordance with these established indust conditions. But the same sports program that is unavailable to t broadcast station is presently made available to the station's au ence by CATV systems. In the words of the president and gene manager of Wisconsin Valley Television Corp. (AMST commen attachment B, p. 10, quoting the House CATV hearings on H.R. 77 p. 415):

> Another serious problem: In Wausau, Wis., because of our proximity Green Bay, WSAU–TV is blacked out of the Green Bay Packers foott games. This I can understand on behalf of the National Football League a the Green Bay Packers * * *. I'm not allowed to carry the games. Any ca system can reach to any area and get these games—some via microwa Then these games can be moved into WSAU–TV's area. Can our station on a Sunday without the football game, while the cable system is runn big ads in the local newspaper; "Get total television on cable television."
>
> Now I would like to deliver total television but because of laws and ru and regulations, I'm not able to give total television. The cable system, w no laws, no rules, no regulations, can deliver to my audience, by FCC defi tion of tower height and power, much more television than I can deliver them because of the stricture that I must operate under * * *."

137. The answer is sometimes given that the CATV system is simp a master TV antenna, and therefore on this ground should be allow such different competitive conditions. But this answer does not wit stand analysis. A CATV system which proposes to employ mic wave to bring in signals 400 or 500 miles away is not a master T antenna service. It cannot seriously be argued that CATV propos to bring the New York independents to Dayton or the Los Angeles i dependents to Dallas-Fort Worth represent master TV antenna a rangements. Nor, whatever its validity in many instances, can t argument appropriately be made when a very tall antenna is employ on a high elevation, with many miles of cable and electronic gear distribute the distant signals. In any event, the question remains: the distant signal is freely available for use in the area, as the CAT argues, why is it not just as freely available for use by the broadca stations in the area (e.g., through a tall antenna on a high elevatio Clearly, however, it is inconsistent with all notions of propriety to s that a Philadelphia or Baltimore UHF station may make whatev use it desires, without permission or payment of the programing c

e over the New York independents. See section 325(a), and its gislative history. The result of such "freedom of access" would be rs inequity and chaos.[62]

38. Here again we have reached no final determination but rather a) concluded that this is a question warranting thorough explora- o in the hearing process. It may be that whatever the disparate ditions for operation, there is no need for concern because the ATV will not significantly affect the development or healthy mainte- ace of UHF television broadcast service. But as stated we cannot ke that determination on the record now before us. It follows that his ground also, there is need for a procedure pegged to full explo- ion of the issue in the context of an evidentiary hearing.

he major market, distant signal policy, and procedure

39. We have previously found that CATV can make an important ribution to the public interest, and we adhere to that judgment. ATV, along with other auxiliary services, has made a significant ribution to meeting the public demand for television service in es too small in population to support a local station or too remote istance or isolated by terrain to receive regular or good off-the-air ception. It has also contributed to meeting the public's demand for e reception of multiple program choices, particularly the three network services. In thus contributing to the realization of some he most important goals which have governed our allocations aning, CATV has clearly served the public interest "in the larger more effective use of radio." And, even in the major market, re there may be no dearth of service (e.g., Philadelphia, with r) full-time network services, and four independent UHF stations er on the air or authorized), CATV may, we recognize, increase ing opportunities, either by bringing in programing not other- is available or, what is more likely, bringing in programing locally ilable but at times different from those presented by the local ions. But this contribution (and related ones such as better recep- etc.) should not be made at the expense of healthy maintenance HF operations. We have reached no determination on this criti- matter. Rather, we have decided that a serious question is pre- d whether CATV operations in the major markets may be of nature or significance as to have an adverse economic impact the establishment or maintenance of UHF stations or to require stations to face substantial competition of a patently unfair re. We have also indicated our concern with the relationship, ay, of proposed CATV operations on the large markets and the lopment of pay-TV in those markets.

40. Our policy and implementing procedure are therefore ad- ed squarely to these serious questions. The basic thrust of con-

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[62] he answer that the CATV does not have a "free ride" in view of the cost of the cable m, misses the point, since the cost of the disseminating system is no basis for exemp- rom observance of the fundamental distribution process by which the program prod- obtained. Both the CATV and the UHF station have substantial costs of construc- maintenance and operation. Thus, the most recent UHF station in Chicago, Ill., had construction cost of about $3,000,000, with substantial estimated yearly operating ex- s, including those sums allocated to programing costs. The UHF station cannot ap- ate the programing of the New York independents, without consent or payment, no t what its costs are.

gressional policy in the Communications Act is to resolve si important questions, in the context of appropriate evidentiary he ings, before consequences possibly adverse to the public inte develop. (Cf. sec. 309 of the Communications Act.) We think t that policy should be applied to this situation. We have determi that we have jurisdiction over CATV necessary to carry out the p visions of the Communications Act (such as secs. 1, 4(i), 303 ((g), (r), (s), and 307(b)). It is important, we think, to exer that jurisdiction with respect to CATV operations in the major m kets, so as to insure that such operations will be consistent with public interest. And to accomplish this, it is necessary to exam thoroughly such operations before they become established or v entrenched. Once entrenched, it is difficult, if not wholly impra cable in the light of the disruption which would result, to take ef tive action or to attempt to roll back the situation, if it should deve or be shown that the CATV operation is inconsistent with the pul interest.

141. We shall accordingly follow a procedure whereby the signa a television broadcast station shall not be extended beyond its grad into the top 100 major markets (as ranked by ARB on the basis net weekly circulation of the largest station in the market) b CATV system which has obtained a franchise for operation in s a market, except upon a showing made in an evidentiary hearing t such operation would be consistent with the public interest, and par ularly the establishment and healthy maintenance of UHF televis broadcast service. In this way, the Commission will be able to expl in depth the details of the proposed CATV operation, the market studies which have been made relating to it (by either the CA or broadcast groups in the area), the present and potential pict as to television broadcasting in the market, the positions and showi of the interested CATV and broadcast parties, the possible plans potential of the proposed CATV operation for pay-TV, and ot important facets. After such exploration, the Commission will b a position to make an informed judgment directed to the facts particular case.

142. We believe that the procedure which we have adopted is and best suited to promote the public interest, taking into acco both the development of the broadcast and the CATV industries. is in line with the urging of several parties that what is needed is evidentiary hearing. While the hearing urged has usually been of an overall nature, we believe it best to consider these import matters in the context of the particular request and the partic situation.

143. We recognize that the evidentiary hearing may consume s significant period of time. But as stated, the public interest requ thorough exploration of the very important issues raised: they can be sloughed aside or the answers lightly assumed. Further, the quirement for an evidentiary hearing has been confined to the 100 markets, where there is generally no dearth of service and UHF services are coming on the air. For example, in Philadelp there are three VHF network affiliated stations, three UHF i

pedents on the air, with a fourth authorized. In the markets below 10, where there may be a greater present need for additional television service, the general *requirement* for evidentiary hearing is inaplicable. See paragraph 146, infra.

44. We have selected the top 100 markets for special attention ecause it is in these markets that UHF stations or wire pay-TV ased upon CATV operations are most likely to develop and therefore th problems raised are most acute.[63] Further, as noted, any delay in commencement of CATV operation because of the necessity for evidetiary hearings is mitigated by the consideration that these markets gerally have a considerable amount of presently available and pspective new service. Finally, the top 100 markets include roughly 9 Dercent of the television homes in this country. Our policy therefo focuses on the critically important areas.

45. Admittedly, there can be substantial problems affecting the pblic interest where the CATV system proposes to extend the signals ofbroadcast stations beyond the grade B contour into areas below th top 100 markets. But there are differences between the two situatins which call for different procedures. In markets below the top 10, the independent UHF (or VHF) station is much less likely to dvelop; the stations in such markets are apt to be three or less in mber and network affiliated. This means, in turn, that the nonduplication provision is effective (since network programing will be sgnificantly involved), and protection of a station's network progming should contribute very substantially to insuring its continued vibility. It would appear that network programing will continue tbe available in such markets; in the unlikely event that such progming becomes unavailable because of CATV impact, there would apear to be other appropriate remedial action which can be taken. Frther, it is in the markets below 100 that there may be underserved aas where CATV can make its most valuable and traditional contbution. Indeed, the market division which we adopt is really a dvision between CATV in its traditional sense and the new, revolutinary facet of CATV, as posed by its entry into the major markets. Its the latter which peculiarly requires the most thorough examinatin in the context of an evidentiary hearing.

46. We think, therefore, that a fair compromise is to draw the lie as to special attention (i.e., evidentiary hearings) at the 100th mrket, and below that point, simply to take such action as may be

[63] Some question may arise as to whether a particular system is located in a market comin within the top 100. For clarification, we have specified that the above provisions are aplicable to a CATV located in a community coming within the predicted grade A contour of ny station in one of the top 100 markets. We have employed the grade A contour of ar station since, while stations often are located at different sites or have different powers oneights (and thus different A contours), these grade A service areas in the same market hve a tendency of becoming fairly close to one another over a period of time. In any event, wthink that this is an appropriate criterion since it encompasses the essential area upon wch new UHF broadcast operations in the market would be based, without including the mch larger areas falling within the grade B contours, as has been urged by some in this pceeding. Because our effort is to carve out such an essential area upon which new UF development would be vitally based, we have employed the predicted grade A contour; n of the predicted contour should also have the advantage of definiteness and easier admistration. In the unusual instance where the requirement may be inappropriate, waiver cn be sought. Where a CATV system is located within the top 100 markets when a hearin is commenced, the hearing will be continued even if these markets change in a subsequnt ARB rating. We note that the 1965 ARB listing makes no change in the 1964 listin of the top 100 markets except as to relative standing within the 100.

necessary in the public interest, upon appropriate petitions bringi substantial questions to our attention. See paragraph 98. We sh not necessarily hold evidentiary hearing in connection with such pe tions in the smaller markets. Such hearings could be a considera burden both upon the CATV operation and the broadcaster in the small communities. See paragraph 78, first report, 38 F.C.C. page 714. Indeed, the hearing might thwart the initiation of need service. Therefore, while hearings might be held in some instanc we have devised flexible procedures generally to treat expeditious petitions or requests involving the markets below 100, since we re ognize that to hold hearings upon each such petition or request mig be burdensome to all parties involved and to the public.[64]

147. *The question of grandfathering.*—On February 15, 1966, issued a public notice giving the essence of our determination in t respect. Systems not yet in operation on February 15, 1966, and pr posing to extend the service of a station beyond its grade B conto into one of the top 100 markets will come within the scope of our maj market procedure, and must make the necessary showing in an ev dentiary hearing. In view of the very great desirability of avoidi the disruption stemming from action applicable to an operating syste and the strong public interest considerations underlying our polic we think good cause exists for immediate effectiveness of the maj market rules upon their publication, as suggested by some of the parti A line must be drawn as to "grandfathering," and we believe it appr priate to do so upon the basis of operation on the date of the publ notice. A system which has gone into operation by extending signa beyond their grade B contour to subscribers in the top 100 markets f the first time after that date, would be subject of a cease-and-desi proceeding.[65] Since we shall not "grandfather" systems coming in operation after February 15, 1966, the effectiveness of our action, pra tically speaking, is geared to that date. We could follow normal pr cedure and wait until 30 days after publication in the Federal Regist to proceed against systems commencing operation after February 1 1966, in the top 100 markets. But we do not believe that this hiat would serve any useful purpose or the public interest. For, in t interval, a system might commence operation after the February date and make "drops" to a significant number of subscribers, all whose CATV service could be ended when the Commission institut cease-and-desist proceedings as to the CATV operation. In the ci cumstances here, where "grandfathering" is pegged to the February 1 date, we think that orderly procedure and the desirability of avoidi disruption as much as possible call for immediate Commission actio

[64] As previously stated (n. 51, first report, 3 F.C.C. at p. 715), we will, as required the Communications Act and consistently with its procedural specifications (e.g., sec. 309 examine any question raised in connection with individual microwave applications whi bears on the public interest in the particular applications involved.

[65] We recognize that this may catch some systems just prior to the commencement operation. But this will always be true in the case of any policy in this area, and in a event, if the policy is to be effective and achieve the above described goals, it must implemented immediately. We also point out that parties have known of the Commissio proposals for a major market procedure since Apr. 23, 1965 (and of the counterproposa since July 26, 1965). The notice expressly "* * * put all persons who now operate who propose to operate CATV systems on notice that CATV operations may be subject Commission regulation of the nature indicated, whether microwave is used or not" (notic par. 65, 1 FCC 2d at 477). Finally, in the unusual case, we can consider the matter up petition for waiver.

ther than the Commission waiting passively on the sidelines for the 30day period to expire. Good cause therefore exists to make the rules to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.[66]

48. The essential purpose of our policy is to take hold of the future—to insure a situation where we or the Congress, if it chooses, can make the fundamental decisions in the public interest upon the basis of adequate knowledge. So far as the application of our major market distant signal policy, we do not intend to disrupt the existing situation, by withdrawing from any CATV subscriber any signal which he was receiving as of February 15, 1966, in the top 100 markets or which he is presently receiving in other markets.[67] Based on our experience, we regard such a withdrawal as impractical and, in any event, we note that we have not made any basic policy judgment which would warrant such undue disruption. We therefore shall "grandfather" all systems which were in operation upon February 15, 1966 (the release date of the above mentioned public notice), to the extent that such systems need not make the showing in section 74.1107 to continue to carry to subscribers signals beyond their grade B contour, which were being supplied to those subscribers on that date. But any addition of a new distant signal on an existing system in the top 100 markets would come within the major market policy.

49. The foregoing dealt with grandfathering. We turn now to the question whether systems extending signals beyond their grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographical areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing).[68] While there may be a disruptive factor in freezing CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the

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Similar good-cause grounds are applicable to the provision of the rule dealing with markets ranked below the 100th (74.1107(c)), since the public interest would not be served by permitting situations to continue to develop which raise substantial questions and may result in either disruption of service or inability to take an otherwise desirable action because of the factor of disruption. We shall also make effective upon publication the procedural provisions (secs. 74.1105, 74.1109) which relate to sec. 74.1107.

As to the application of our carriage and nonduplication rules, see pars. 49, 68, 106.

And certainly where a new franchise or amendment of an existing franchise after F. 15, 1966, to operate or extend the operation of the CATV system in the same general area is involved, the requirement of an evidentiary hearing will be applicable.

geographical extension of the CATV system to new areas, and r sponses thereto. The petition may also request temporary relief in t event an evidentiary hearing is found to be appropriate; the Commi sion will determine, upon the basis of the showing and responses the particular case, whether such temporary relief is called for, a if so, its nature. In view of the nature of the problem, the Commissi will give expedited treatment to petitions in this area. Finally, wish to stress one important facet: We have previously put all parti on notice as to the pendency of our proposal and have now put parti on notice that there should not be expansion of major market syste from a few thousand subscribers to a very substantial number of su scribers until resolution of the public interest issues posed. We expe CATV operators to heed this notice and not to attempt to circumve orderly consideration of any petition in this respect by an extraord nary effort to wire up the community or a substantial portion of i In any event, we are requiring the submission of data showing t extent of construction of the system as of February 15, 1966. Whi we expect the ordinary wiring operations to have continued since th date, any extraordinary wiring efforts or entry into patently ne geographical areas (e.g., extension of a system from a suburb into t main community) will be at the risk of the system and will not accorded weight in the judgment to be made.

150. As we gain more knowledge in this important area, particular from the hearings being held, we shall revise or terminate the proc dure, as the experience indicates. The present rules are our best jud ment of what the public interest now calls for. We recognize that th may not perfectly fit every situation, and repeat that should they inadequate or unduly burdensome in individual cases, special acti or waiver can be obtained upon an appropriate showing. *Unit States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

151. Finally, we stress that the rules do not halt CATV service growth. With the possible exception of the applicability of our ca riage rules (see par. 66), the CATV viewing public will not be d prived of any distant signal service which it was receiving as of Febr ary 15, 1966. CATV will not be precluded from bringing new servi to underserved areas or from bringing better reception in cities suc as New York. With possibly only the rarest exception, CATV activit which does not involve extension of a signal beyond its grade B contou may freely continue.[69] CATV expansion into markets below t top 100 may also continue and will be the subject of Commissi scrutiny only upon petition in a particular case. Thus, we have co fined our special attention to the area of most concern—the top 1 markets where UHF stations are most likely to be coming into exis ence. And, in line with our present general policy in dealing wit microwave applications (see par. 49, notice, 1 F.C.C. 2d at p. 47

[69] If two major markets each fall within one another's grade B contour (e.g., Washingt and Baltimore), this does not mean that there is no question as to the carriage by a Bal more CATV system of the signals of Washington; for in doing so and thus equalizing t quality of the more distant Washington signals, it might be changing the viewing habi of the Baltimore population and thus affecting the development of the Baltimore indepen ent UHF station or stations. Such instances rarely arise, and can, we think, be dealt wi by appropriate petition or Commission consideration in the unusual case where a proble of this nature might arise.

w have specified no "freeze" but rather a full exploration of the facts o each case, so that we may make an informed judgment on this most mportant question. We believe that this is a reasonable way to pro- ed, and that the public interest requires no less a procedure.

52. *Legislative proposals.*—The foregoing discussion treated mat- es in part I and paragraph 50 of the notice of proposed rulemaking. T remaining matters in part II of the notice will be considered on t basis of the comments filed in that part and the experience gained. Fr the reason also, this report is designated as the second report. W turn now to a brief discussion of the legislative proposals which w believe are desirable.

53. There are four areas which we shall urge to the Congress as p ticularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. See notice, paragraph 31, 1 FCC 2d at page 465.

(ii) We believe that congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in paragraphs 128–129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire-pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire-pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest; since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are consideriug petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to section 325(a) applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditious under which the broadcasting and CATV industries compete. See paragraphs 131–138.[70] Several parties

[70] The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by station WNDU–TV, South Bend, Ind. See letter to Mr. Asa S. Bushnell, dated Oct. 28, 1965, public notice, dated Oct. 29, 1965, mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU–TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA television committee, while it is continuing to study the matter, recently adopted a new regulation stating:

"Any televising privilege granted under article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 NCAA television committee, Jan. 10–12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area (as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

such as NBC have urged that a section 325(a) approach would obviate need for much, if not all, of the Commission regulations in this area a would serve the public interest. We are not in a position to state whethe section 325(a) approach would be effective and fully consistent with public interest. We think that this is a matter warranting congressio (and Commission) consideration, including such aspects as how a " transmission consent" requirement would function as a practical matt whether systems in small communities should be dealt with specially, a whether grandfathering is appropriate and the nature of any such gra fathering.

(iv) Finally, Congress will be asked to consider the appropriate r tionship of Federal to State-local jurisdiction in the CATV field, with p ticular reference to initial franchising, rate regulation, and extension service.

CONCLUSION

154. Authority for adoption of these rules is contained in sectio 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. W wish to stress particularly the provisions of section 1 that the gene purpose of the act is to "maintain the control of the United States ov all the channels of interstate and foreign radio transmission * * under licenses granted by Federal authority"; of section 303(h), " establish areas or zones to be served by any station"; of section 307(to make "a fair, efficient, and equitable distribution of radio servi among the several States and communities", section 303(g), to stu new uses of radio and generally encourage the larger and more ef tive use of radio in the public interest, and section 303(s), the "a channel receiver" section. The rules we adopt here, under the ru making power bestowed upon the Commission in sections 4(i) a 303(r), are designed to "study new uses" and insure future CA activity and growth consistent with the "larger and more effective of radio in the public interest." Indeed, the type of situation h involved is the very reason for the creation of this agency as t history of early chaos in the radio field shows. As the Supreme Co has stated, the Communications Act "expresses a desire on the part Congress to maintain, through appropriate administrative contro grip on the dynamic aspects of radio transmission" (*FCC* v. *Pot ville Bctg. Co.*, 309 U.S. 134, 138; see also *NBC* v. *U.S.*, 319 U.S. 19

155. In this connection, we stress that we are not committed to t status quo—to protecting existing investment against new technolo cal advances. The whole history of this art has been one of gr change, from radio to television to perhaps tomorrow satellite bro casting or laser communication. It may be that CATV, if allow full unfettered growth, would prove to be an excellent supplem bringing additional service and diverse programing to millions people in built-up areas who can afford it, without detriment to t provision of additional local broadcasting service to the entire N tion. If so, the information obtained in the hearing process w provide that indication, and will be the basis for authorizing su growth. But we cannot make that judgment in the record now bef us—and, instead of the above picture of wire television as an exc lent supplement, there is the possibility that the Nation might fi itself with a system half wire, half free, which is destructive of t larger goals of additional networks, additional outlets for local pression, and which provides increased service to some in the city

e expense of those in the rural area or those who cannot afford to ıy. It is, we think, time to get the facts, and in light of the service resently available, there is time to get the facts.

156. Accordingly, *It is ordered*, This 4th day of March 1966, that te rules contained in the attached appendix D are adopted, effective pril 18, 1966; *Provided, however*, That the provisions of section 4.1103 are not effective as to existing operations of nonmicrowave CATV systems until 60 days thereafter, and provided further that te provisions of sections 74.1105, 74.1107, and 74.1109 are effective imediately upon publication in the Federal Register.

It is further ordered, That pursuant to section 403 of the Commuıications Act, all CATV systems in operation on April 18, 1966, sall within 30 days thereafter file with the Commission the inforıation described in paragraph 99 of this report.

It is further ordered, That the proceedings in docket No. 15971 *re not terminated* and that, in light of the comments on part II of ocket No. 15971 and/or such further proceedings as the Commission ıy order, amendments may be made to the rules set forth in the ached appendix C or additional rules may be adopted.

It is further ordered, That the proceedings in dockets Nos. 14895 ad 15233 *Are terminated*.

APPENDIX A

Comments and/or reply comments on part I and paragraph 50 of this proceedi were filed by:

AFL–CIO affiliated labor organizations
Allied Artists Television Corp.
American Broadcasting Co.
American Cable Television, Inc.
American Farm Bureau Federation
American Telephone & Telegraph Co.
Aroostock Broadcasting Corp.
Association for Competitive Television
Association of Maximum Service Telecasters, Inc.
Black Canon Broadcasting Co.
Bonneville International Corp.
Clearview of Georgia, Inc.
Columbia Broadcasting System
D. H. Overmyer
Entron, Inc.
Eastern Educational Network
Fuqua Industries, Inc.
G. T. & E. Service Corp.
Houston Post Co.
International Telemeter Corp.
Jack O. Gross, d/b/a Gross Broadcasting Co.
Jerrold Electronics Corp.
Journal Co.
Joint comments of stations KHOU–TV, KOTV, KXTX, WANE–TV, WAVE–TV, WFIE–TV, WFRV, WISH–TV, WJXT, WMT–TV, WNOK–TV, WTOP–TV
Meredith Broadcasting Co.
Mesa Verde Broadcasting Co., Inc.
Micro-Relay, Inc.
Midwest Television, Inc.
Mobile Video Tapes, Inc.
National Association of Broadcasters

National Association of Educational Broadcasters
National Broadcasting Co.
National Community Television Association, Inc.
National Educational Television
National Farmers Union
National Grange
Phillips, Nizer, Benjamin, Krim & Ballon
Rogers TV Cable, Inc.
Rust Craft Broadcasting Co.
San Diego Telecasters, Inc.
Smith & Pepper (on behalf of over 150 CATV systems)
Snyder & Associates
Springfield Television Broadcasting Corp.
Storer Broadcasting Co.
Superior Broadcasting Corp.
Taft Broadcasting Co.
Telerama, Inc.
Triangle Publications, Inc.
Tri-State TV Translator Association
Trans Video Corp.
TV Cable Service of Abilene, Inc.
U.S. Independent Telephone Association
West Central Broadcasting Co.
Westinghouse Broadcasting Co., Inc.
Western Slope Broadcasting Co., Inc.
WGAL Television, Inc.
WJAC, Inc.
WKBH Television, Inc.
WTVY, Inc.
William L. Fox

APPENDIX B

SUMMARY OF COMMENTS ON PARAGRAPH 50

National Community Television Association (NCTA) urges that a rule along t lines of the policy adopted in paragraph 49 and proposed in paragraph 50 "completely arbitrary," "unnecessary," and "would be a virtual prohibition provide CATV service in such communities (NCTA comments, pp. 13–14 By way of support NCTA quotes at length (NCTA, exhibit B, pp. 14–22) fro the discussion in the Seiden report concerning "CATV in Three-Station Market (pp. 84–86) and from the Fisher report concerning the effect of noncarriag on audience and revenues where there are three or more off-the-air progra alternatives (pp. 91–92). NCTA states that the Seiden and Fisher conclusio "show conclusively that there is absolutely no basis for allegations of CAT as an adverse factor in the potential development of UHF television in lar cities" (NCTA, exhibit B, pp. 22, 32). NCTA asserts further that there is criterion for determining whether a CATV system might at some time have t effect of delaying construction of a UHF station in a three-station mark (NCTA comments, p. 14, exhibit B, p. 31). Finally, it states that the existen of a CATV system in a community has not in the past prevented constructio of a successful VHF or UHF television station in the community (ibid.).

Other comments on behalf of CATV interests challenge the proposed paragra 50 rule principally on the ground of alleged lack of jurisdiction over CATV sy tems. It is asserted in addition that CATV will help UHF by providing good qu ity reception to an immediate audience prior to all-channel set saturatio Because of this, some UHF permittees in major cities have indicated no objectio to CATV entry. It is further asserted that the success of independents w ultimately depend on their ability to provide a program service which will attra viewers and advertisers. International Telemeter Corp. states that if and wh CATV systems are established on a broad base in large metropolitan areas, the may well be utilized for pay-TV operations as an adjunct to other forms wire television (Telemeter reply comments, p. 11). But, Telemeter adds (ibid. "this is not to say that the public interest will not be served by the result * * * "the multiplicity of services via wire television systems can only serve, not harm the public interest."

The comments of the American Broadcasting Co. (ABC) support the proposal. BC states that a CATV operator in a market such as Philadelphia could carry ıe several New York independents to the very serious detriment of the local hiladelphia UHF stations, and that the carriage and nonduplication rules resently adopted by the Commission are not truly responsive to the "unexpected ractionalization of the audience interested in independent programing." ABC ierefore believes that the Commission should "establish the areas or zones" ormally to be served by television stations and delineate the circumstances under hich a station's signals may properly be brought to areas not within its normal ervice area. It asserts that interim rules, pending the adoption of final rules ı part II, are needed because once CATV systems are established in markets ıat have a potential for independent UHF station development in the reason- bly near future, the Commission will find itself in the impossible position of ying to undo what has already been done—of possibly adopting a regulation hich would deny to substantial numbers the service which they assumed they ould receive and for which they have already paid. ABC therefore urges the doption of a rule prohibiting any person from transporting the signal of a V station beyond its grade B contour into a community within the range of our or more commercial grade A assignments and receiving grade A or better ervice from three or more commercial TV stations (or two such stations with third station already authorized). ABC states that such a rule would apply asically to all but three of the Nation's top 100 markets and therefore to those reas which now or shortly will have three or more local network services and ıe reasonably immediate likelihood of a fourth commercial service; that with his amount of service, these areas do not have any pressing need for additional ervice via wire, and they are also the areas which hold the most possibilities or UHF development; that the interim procedure would insure that a significant ay-TV service would not be established while the Commission is reaching its nal decision in this proceeding and in the pay-TV rulemaking proceeding that as recently been requested; and that at the same time, the interim procedure ill not preclude the development of CATV in these relatively underserved areas here it serves as a needed adjunct to free television service. Above all, ABC resses that the proposed rule will prevent the establishment of CATV systems ı areas and under conditions which the Commission may ultimately conclude ould inhibit or prevent the normal development of UHF television.

Westinghouse in its comments takes a position similar to that of ABC. It rges a restriction upon the importation of signals into communities situated ithin the grade A coverage of four or more commercial TV assignments and ommunities within the grade A coverage of three or more commercial stations ctually in operation (with exceptions (i) for two station markets with an utstanding construction permit for a third station where such permit is not ctivated within 6 months, and (ii) to areas within the grade A coverage of three ations not receiving the full service of the three networks because of the existing etwork affiliation relations). It asserts that many applicants for CATV fran- hises in big cities today are promising to deliver such stations as WOR–TV nd WNEW–TV, New York, and WGN–TV, Chicago; that these are well-estab- shed, independent stations in major markets, and, compared with a UHF station ist getting started in another city, have a much greater economic base to make ıajor expenditures for programing; and that the local UHF station, competing ith these major stations for what is at best a limited audience (i.e. the audience or nonnetwork programing), will be unable to get a large enough share of this udience necessary for it to produce the income needed for the station to buy rograming with which it can *in fact* compete for viewers with the other ations on the system. It states that CATV only brings its service to some iewers—those fortunate enough to live in areas with a large enough local opulation to furnish an economic base for the laying of CATV cable, and then nly those living in such areas who can afford to pay CATV fees. Westinghouse sserts that CATV in big cities also has the obvious potential of transforming tself into pay-TV, and points to recent news reports that tell of a company hich was unsuccessful in its efforts to operate a pay-TV system in one city ı Canada and is now planning to take over a successful major CATV system ı another Canadian city and convert it to pay-TV in whole or in part. Finally, Vestinghouse stresses the need for an interim rule, stating that once CATV ranchises are granted in the larger markets and construction of the systems

is commenced pursuant to those grants, the Commission, from a practical an political viewpoint, will have lost effective control of the situation in those area

Storer Broadcasting Co. also supported the proposal because, it asserts, ther is a definite probability of serious impact on television development in suc cases, and the Commission cannot, through inaction, permit events to occu which jeopardize the goals set by the Congress and the Commission lookin toward a competitive nationwide system of intermixed local television facilitie It urges that there is an established immediate need to "hold the line," durin the interim period, on importation of distant signals to the major markets wher CATV's "present stampede" into these markets might destroy the independen stations' audience potential "through importation of competitive programin on unequal terms" (Storer comments, p. 12). Storer also states that if the polic is to be effective, it should be applied to affiliated as well as Independent UH stations, and that it should be extended to CATV systems in nearby communitie upon which the UHF depend for audience circulation. It asserts that a UH station, although nominally a network affiliate, may still rely largely on inde pendent programing, and that therefore its development requires the sam protection as that proposed for independent UHF operators; and that CAT systems in nearby communities "can impose drastic damage on that station' audience circulation, particularly on a cumulative basis." (Id. at p. 14.)

The Association of Maximum Service Telecasters (AMST), Midwest Tele vision, Inc. (Midwest), and the joint comments of KHOU–TV, KUTV, KXTX WANE–TV, WAVF–TV, WFLE–TV, WFRV, WJXT, WMT–TV, WNOK–TV WTOP–TV (joint comments) all urge the adoption of interim procedures goin beyond those proposed in paragraph 50. The factual basis of AMST's an Midwest's comments have been described in part (see pars. 31–41). In additio AMST cites the experiences of the UHF station in Lock Haven, Pa., and o UHF station WRLP, Greenfield, Mass., in the face of CATV competition AMST asserts that the importation of outside large city independent televisio stations by CATV will be an obstacle to the development of a fourth network since it will jeopardize the development of the UHF stations in these cities AMST also states that the entry of CATV into larger cities poses a substantia threat to the development of network UHF service, citing in support statement made to the Commission or to the Congress of Rust Craft Broadcasting Co. permittee of WJKS–TV, Jacksonville, Fla., and WCCB–TV, a new UHF statio in Charlotte, N.C. Midwest describes the explosive growth of CATV in th Peoria-La Salle area, the Springfield area, the Champaign-Danville area, th WCIA service area generally, and the San Diego area (see pars. 34, 39–41) The joint comments assert that proposals to bring multiple distant signals int areas such as Fort Wayne, Ind., Columbia, S.C., Jacksonville, Fla., and Indian apolis, Ind., jeopardize or foreclose the development of new UHF stations h these areas. The joint comments point out that in the area served by th existing Sacramento-Stockton stations, CATV systems have been franchised o have commenced operations in at least 31 communities, and applications fo franchises have been filed or proposed in at least 18 more—including Sacrament and Stockton themselves; that the total number of households in these cities an communities is more than 250,000, representing a major portion of the audienc now served by the three existing Sacramento-Stockton commercial stations an a still more substantial portion of the audience which would be served by KPX the newly authorized UHF station on channel 29 in Sacramento; that as th permittee for the new UHF station in Sacramento has informed the Sacrament City Council, the importation of outside signals from San Francisco-Oaklan and Los Angeles stations, as proposed, would make it impossible for the new UHF station to survive.

AMST, Midwest, and the joint comments propose the interim rule that n CATV system shall be permitted to extend the signal of any television broad cast station beyond its grade B contour except upon a clear and full showing (*a*) that there are special circumstances, for example, that the community i remote and isolated and does not have, and cannot be expected to receive i the future, direct off-the-air local or area television service; and (*b*) that th operation of the CATV system, taken together with the operations of all othe CATV systems operating or franchised or which are being proposed in the are in question, would not pose a substantial threat to the maintenance or th expansion of any existing UHF station or the development of new UHF servic

in the area. AMST urges that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rulemaking. It states that an alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule, (*a*) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (*b*) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

In reply comments ABC and Westinghouse assert that their interim proposal would better serve the public interest because it has been designed to prohibit the development of CATV in areas where it could adversely affect the overall public interest but not to prohibit its development where it could have little adverse effect upon the public interest and where there may well be a substantial public need for CATV services. In its reply, AMST asserts that its interim procedure would not have the effect of being a complete ban on CATV; that it would leave untouched the further expansion and development of CATV in its historic functions—(*a*) the providing of service to communities that are remote and isolated and do not have, and cannot be expected to receive in the future, direct off-the-air local or area television service, and (*b*) the providing of film service, improving the off-the-air service of local and area television stations in pockets within their normal coverage contours where for terrain or similar reasons a desirable quality of service is not received. It further argues that if there are indeed situations in which a CATV entrepreneur can show that he will aid rather than threaten the maintenance or expansion of existing UHF stations and the development of new UHF service, appropriate interim rules and policies will leave it open to the CATV entrepreneur to make such a showing. AMST urges that the ABC and Westinghouse interim procedure are inadequate because they seek at the most to protect only those communities or areas which could ultimately have *four* television stations; that even as to those communities or areas, three television stations must already be active or two must be active and the third imminent; and that the proposed rule would apply only in the grade A contours of those existing or imminent stations. AMST states that there is no reason—*at least* in the interim—to allow CATV to retard UHF development in *any* market. And that it is entirely possible for CATV systems in dozens of small communities to blanket most of the audience potential in the station's service area beyond its grade A contour; and that the area can thus be very effectively denied to a small UHF station—possibly the difference between survival and failure, and at least the difference between effective programing and ineffective programing.

APPENDIX C

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *." These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or

radio. They transmit "pictures, and sounds * * * by aid of wire" and "instrumentalities * * * [used for] * * * the receipt, forwarding, and deliv of communications * * * incidental to such transmission," and hence fall wit the definition of wire communication under section 3(a).[1] Moreover, CA systems constitute *interstate* communication by wire, since they form a c necting link in the chain of communication between the point of origin (transmitting station) and reception by the viewing public (the CATV s scriber)—a chain which "is now well established * * * as interstate c munication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Ra Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).[2] The law clear that the mere location of communication facilities wholly within one St does not establish that the communication service rendered over such facilitie an intrastate service, and that a communications service can be interstate foreign in nature and subject to the Commission's jurisdiction even though the facilities are located within the confines of one State. *California Interst Telephone Company* v. *F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward* v. *Northern O Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific T tronics, Inc.*, FCC 64–1180, 4 R.R. 2d 145 (1964). CATV systems are extensi of the interstate service of the television broadcast stations whose signals t carry, *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), hence constitute "interstate communication by wire" to which the provisions of act are applicable (secs. 2(a), 3(a)). See *American Trucking Association United States*, 344 U.S. 298, 311.[3]

With respect to the Commission's authority to adopt the rules proposed in notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] a that are to be applied to CATV systems, there are the following sections: S tions 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (As the notice and the report and order in dockets Nos. 14895 and 15233 m clear, the existence and growth of CATV systems threaten to impede realizat of the Commission's television assignment plan and policies under sections 1 307(b) (i.e., the sixth report and order).[4] See *Carter Mountain Transmiss Corp.* v. *F.C.C.*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963). Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) t

> perform any and all acts, make such rules and regulations, and issue s orders, not inconsistent with this act, as may be necessary in the execut of its functions (4(i));
> make such regulations not inconsistent with law as it may deem necess to prevent interference between stations and to carry out the provisions this act * * * (303(f));
> establish areas or zones to be served by any station (303(b));
> make such rules and regulations and prescribe such restrictions and co tions, not inconsistent with law, as may be necessary to carry out provisions of this act * * * (303(r)).[5]

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the C mission broad rulemaking authority to carry out the provisions of this act (

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[1] It can be argued that CATV systems, in receiving, forwarding, and delivering the tion's signal to the viewing public, are the instrumentalities incidental to the transmiss of the signal and hence fall within the definition of "communication by radio" in sec. 3 However, it is unnecessary to consider this argument in view of the discussion ab as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operati clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is essential to the question of the Commission's jurisdiction to proceed as proposed in notice of inquiry and proposed rulemaking.

[2] Congressional approval of the *Capital City* doctrine was expressed in connection v the 1960 amendment to sec. 202(b). See 105 Congressional Record at 6256.

[3] It is, we believe, significant that in sustaining the jurisdiction of the Interstate C merce Commission in *American Trucking* the Supreme Court relied solely upon provisi of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 153 (a) and (b).

[4] In addition, as noted in the notice, there exists the potential to frustrate the purpo of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commiss regulations).

[5] Secs. 303 (f), (h), and (r) are preceded by the following clause:
"Except as otherwise provided in this act, the Commission from time to time, as pu convenience, interest, or necessity requires shall * * *."

ss. 1 and 307(b)) with respect to communications or persons coming within e Commission's jurisdiction (including CATV—sec. 2(a)). Section 303(h), particular, was affirmatively designed to assist the Commission in effectuating e fair and equitable distribution of broadcast service called for by section 7(b).[6] The Commission's authority to issue rules establishing the area or ne to be served by any station for this purpose includes the power to prevent fringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to scribe by rule the conditions under which the station's signal may be exded beyond the area or zone to be served by the originating station, by means CATV—an "interstate communication by wire" to which the act's provisions e applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the mmission (secs. 4(i) and 303(r)) includes authority to take necessary action, inconsistent with the act or law, to prevent frustration of section 307(b) by TV. In *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 215–220, the Supreme urt citing, *inter alia*, sections 1, 303(f), and 303(r), stated that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the act gave the Commission not niggardly but expansive powers.

der such "expansive" and "comprehensive" powers,[7] the Commission has aurity to take reasonable and appropriate action, including promulgation of es, "as may be necessary" to carry out the provisions of section 307(b)—insure that the regulatory scheme embodied in that section (the equitable tribution of service) and section 303 is not frustrated by the operation of TV, an "interstate communication by wire" to which the act's provisions are plicable. This authority does not depend on a specific reference to CATV CATV practices in the act. *United States* v. *Storer Broadcasting Co.*, 351 S. 192, 203. See also, *National Broadcasting Co.* v. *United States*, 319 U.S. 3, 218–219, where the Supreme Court stated:

> True enough, the act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * *. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[8]

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[6] Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to nd the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before h House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40–41. See also, *Stahlman* v. *F.C.C.*, 126 F. 2d 124, 128 (C.A D.C.). For the intended comensive scope of Commission authority see, e.g., the following legislative history of the dio Act of 1927, which was reenacted in all substantial respects in the Communications of 1934 (78 Congressional Record 8822–8823, 10313–10314, 10990); 66 Congressional ord 5479; S. Rep. 772, 69th Cong., 1st sess., pp. 2, 3.

[7] The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated 9 U.S. at 217–218):

> These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the fuller and more effective use of radio in the public interest.' We cannot find in the act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its

To the same effect in other fields, see *Houston, East and West Texas Railw Co.* v. *U.S.*, 234 U.S. 342; *U.S.* v. *Wrightwood Dairy Co.*, 315 U.S. 11 *U.S.* v. *Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc.* v. *U.* 344 U.S. 298; *Public Service Commission of State of New York* v. *Federal Pow Commission*, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The *American Trucking* case is particularly pertinent. The Supreme Co there sustained ICC rules "aimed at conditions [trip-leasing] which may rectly frustrate the success of the regulation undertaken by Congress." Af citing sections analogous to section 307(b) in our situation, the Court stat (344 U.S. at 311):

> Included in the act as a duty of the Commission is that "to administ execute, and enforce all provisions of this part, to make all necessary ord in connection therewith, and to prescribe rules, regulation, and procedu for such administration." And this necessary rulemaking power, coterminc with the scope of agency regulation itself, must extend to the "transportati of passengers or property by motor carriers engaged in interstate or forei commerce and to the procurement of and the provision of facilities for su transportation" regulation of which is vested in the Commission by 202(a See also 203(a)(19).

We point out that section 204(a)(6) of the Motor Carrier Act is substantia similar to sections 303(r) and 4(i) of the Communications Act; while in t circumstances, sections 202(a) and 203(a)(19) of that act are closely analogc to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusi "despite the absence of specific reference to leasing practices in the ac stating (at pp. 309–310):

> Our function, however, does not stop with a section-by-section search f the phrase "regulation of leasing practices" among the literal words of t statutory provisions. As a matter of principle, we might agree with pellants' contentions if we thought it a reasonable canon of interpretati that the draftsmen of acts delegating agency powers, as a practical a realistic matter, can or do include specific consideration of every evil soug to be corrected. But no great acquaintance with practical affairs is requir to know that such prescience either in fact or in the minds of Congress, d not exist. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 21 220; * * *. Its very absence, moreover, is precisely one of the reasons w regulatory agencies such as the Commission are created * * *.

See also, *Public Service Comm. of N.Y.* v. *FPC*, 327 F. 2d 893, 896–97 (C.A.D.C

Of course, the rules must be "reasonably necessary and fairly appropriate" t the protection of the regulatory scheme. *Colorado Interstate Gas Co.* v. *Fede Power Commission*, 142 F. 2d 943, 952 (C.A. 10). See also, *American Trucki Assn.* v. *U.S.*, 344 U.S., at 314–315; *National Broadcasting Co.* v. *U.S.*, 319 U at 219 ("Generalities unrelated to the living problems of radio communicati cannot justify exercises of power by the Commission").[10] The report and orc in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necess

signal. But the community could be deprived of good radio service in ways less cru One man, financially and technically qualified, might apply for and obtain the licenses both stations and present a single service over the two stations, thus wasting a frequer otherwise available to the area. The language of the act does not withdraw such a sit tion from the licensing and regulatory powers of the Commission, and there is no evide that Congress did not mean its broad language to carry the authority it expresses."

[9] The *Public Service Commission* case sustained the power of the Federal Power Comm sion to issue temporary certificates to protect producers, although sec. 7(e) of the Fede Power Act expressly authorized such action only to protect customers, on the basis of t broad provisions of sec. 16 of that act which are virtually the same as sec. 303(r) of t Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Co mission need not be found in explicit language. Sec. 16 demonstrates a realization Congress that the Commission would be confronted with unforeseen problems of adm istration in regulating this huge industry and should have a basis for coping with su confrontation."

[10] The Commission clearly has no jurisdiction over bowling alleys or theaters, for examp as an administrative agency has no greater power than has been conferred by Congre *Stark* v. *Wickard*, 321 U.S. 288; *NLRB* v. *Atlantic Metallic Casket Co.*, 205 F. 2d 9 (C.A. 5). Cf. *Peters* v. *Hobby*, 349 U.S. 331. However, unlike bowling alleys and theate CATV systems intercept and extend the signals of television stations, and thus have uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engag in interstate communication by wire to which the act's provisions are expressly applica

rules requiring all CATVs to carry local stations without duplication for a asonable period. Moreover, the *Carter Mountain* decision establishes the reaableness of the requirements. In affirming the Commission, the Court stated at "this does not appear to us an unreasonable condition," but rather "a gitimate measure of protection for the local station and the public interest" 21 F. 2d 359, at 363–364). The notice of inquiry and proposed rulemaking nilarly demonstrates the validity of the Commission's concern as to the effect CATV on independent stations and programing sources, as well as on the velopment of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested it by the Communications Act, the Commission presently has jurisdiction over CATV systems, whether microwave is used or not; that there are pertinent ovisions of the act applicable to the exercise of authority over such systems (in rticular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the pposed rules and inquiry represent a reasonable exercise of that authority in e circumstances.

APPENDIX D

. Part 21 is amended as follows:

. In section 21.710, paragraphs (a) and (b) are amended and a new paragraph (i) is added as follows:

§ 21.710 Definitions

As used in §§ 21.712 and 21.714:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include, (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

* * * * * * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

. In section 21.712, paragraphs (b), (c), (d)(3), (e), (g), (h), (i), (j) a amended; paragraphs (i)(4) and (k) are added; and note 2 to section 21.712 is eleted:

. § 21.712 Authorizations for fixed stations to relay television signals to CATV systems * * *

* * * * * * *

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an

unoccupied reserved educational television channel assignment und § 73.606 of this chapter, the notice shall also be served upon the super tendents of schools in the community and county and the local area, a State educational television agencies, if any. Such notice shall include t fact of the request for service, identification of each CATV system to util the service requested (either directly or indirectly), identification of t community served or to be served by each CATV system, and the te vision station(s) whose programs will be distributed by each such CA system.

(e) *Stations required to be carried.* Within the limits of its chan capacity, any such CATV system shall carry the signals of operating subsequently authorized television broadcast and 100 w or higher pov translator stations in the following order of priority, upon request of licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations wit whose principal community contours the station operates, in whole or part;

(2) Second, all commercial and noncommercial educational stations wi in whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations wit whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational transla stations operating in the community of the system with 100 w or hig power.

(d) *Exceptions.* * * *

* * * * * * *

(3) The system need not carry the signal of any television translator s tion if (i) the system is carrying the signal of the originating station, (ii) the system is within the grade B or higher priority contour of a stat carried on the system whose programing is substantially duplicated by translator.

(e) *Special requirements in the event of noncarriage.* Where the syst does not carry the signals of one or more stations within whose grad or higher priority contour it operates, or the signals of one or more 100 w higher power translator stations located in its community, the system sh offer and maintain, for each subscriber, an adequate switching device allow the subscriber to choose between cable and noncable reception, unl the subscriber affirmatively indicates in writing that he does not des this device.

* * * * * * *

(g) *Stations entitled to program exclusivity.* Any such system wh operates, in whole or in part, within the grade B or higher priority cont of any commercial or noncommercial educational television station or w in the community of a fourth priority television translator station, which carries the signal of such station shall, upon request of the stat licensee or permittee, maintain the station's exclusivity as a program ou against lower priority or more distant duplicating signals, but not agai signals of equal priority, in the manner and to the extent specified in pa graphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station entitled to program exclusivity, the CATV system shall, upon request of station licensee or permittee, refrain from duplicating any program bro cast by such station on the same day as its broadcast by the station, if CATV operator has received notification from the requesting station of date and time of its broadcast of the program and the date and time of broadcast to be deleted, as soon as possible and in any event no later t 48 hours prior to the broadcast to be deleted. Upon request of the CA system, such notice shall be given at least 8 days prior to the date of broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the requirements of paragraph (h) this section,

* * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until 30 days after the Commission's ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1.—As used in § 21.712(b), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

II. Part 74 is amended as follows:

1. In section 74.1, paragraph (c) (4) is deleted, and two new paragraphs (d) and (e) are added to read as follows:

§ 74.1 SERVICES COVERED BY THIS PART

* * * * * * *

(d) Community antenna relay stations (subpart J).

(e) Community antenna television systems (subpart K).

2. In section 74.1001(e), subparagraphs (1) and (2) are amended as follows and a new subparagraph (9) is added as follows:

§ 74.1001 DEFINITIONS

* * * * * * *

(e) As used in §§ 74.1031 and 74.1033.

(1) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(2) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour shall be deemed an extension of the originating station.

* * * * * * *

(9) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

3. Section 74.1031(c) is amended to read as follows:

§ 74.1031 ELIGIBILITY AND CONTENTS OF APPLICATION

* * * * * * *

(c) An application for any authorization subject to § 74.1033 shall co
tain a statement that the applicant(s) have notified the licensee or pe
mittee of any television station, within whose predicted grade B contour th
CATV system(s) operate or will operate, in whole or in part, and the licens
or permittee of any 100 w or higher power translator station operating in th
community of each such system, of the filing of the application. Where
is proposed to extend the signal of any noncommercial educational televisio
station beyond its grade B contour into a community with an unoccupie
reserved educational television channel assignment under § 73.606 of th
chapter, the notice shall also be served upon the superintendents of schoo
in the community and county and the local, area, and State educationa
television agencies, if any. Such statement of the applicant shall be su
ported by copies of the letters of notification directed to such licensees
permittees and educational interests. The notice shall include the fact
filing by the applicant(s), identification of each CATV system served or
be served under the authorization sought, identification of the communit
served or to be served by each such CATV system, and the television, stan
ard broadcast, and FM station(s) whose programs will be distributed
each such CATV system.

NOTE 1.—As used in § 74.1031(c), the term "predicted grade B contour" means the fie
intensity contour defined in § 73.683(a) of this chapter, the location of which is det
mined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

4. In section 74.1033, paragraphs (a), (b)(3), (c), (e), and (f) are amended
paragraphs (g)(4) and (h) are added; and the note to section 74.1033 is delete

§ 74.1033 LICENSING REQUIREMENTS * * *

(a) *Stations required to be carried.* Within the limits of its channel c
pacity, any such CATV system shall carry the signals of operating or su
sequently authorized and operating television broadcast and 100 w or high
power translator stations in the following order of priority, upon the reque
of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations with
whose principal community contours the system operates, in whole or
part;

(2) Second, all commercial and noncommercial educational statio
within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations with
whose grade B contour the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translat
stations operating in the community of the system with 100 w or high
power.

(b) *Exceptions.* * * *

* * * * * * *

(3) The system need not carry the signal of any television translat
station if (i) the system is carrying the signal of the originati
station, or (ii) the system is within the grade B or higher priority conto
of a station carried on the system whose programing is substantially dup
cated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the syste
does not carry the signals of one or more stations within whose grade
or higher priority contour it operates, or the signals of one or more 100
or higher power translator stations located in its community, the syste
shall offer and maintain, for each subscriber, an adequate switching devi
to allow the subscriber to choose between cable and noncable reception, unle
the subscriber affirmatively indicates in writing that he does not desi
this device.

* * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system whi
operates, in whole or in part, within the grade B or higher priority conto
of any commercial or noncommercial educational television station or with
the community of a fourth priority television translator station, and whi
carries the signal of such station shall, upon request of the station licens
or permittee, maintain the station's exclusivity as a program outlet again
lower priority or more distant duplicating signals, but not against signals

equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

* * * * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

A new subpart K is added to read as follows:

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

Contents

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 DEFINITIONS

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and grade B contours.* The terms "grade A contour" and "grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" me regularly duplicated by the network programing of one or more static singly or collectively, in a normal week during the hours of 6 to 11 p. local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stati established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a t vision station which is not affiliated with any national television netw organization.

(i) *Distant signal.* The term "distant signal" means the signal of a t vision broadcast station which is extended or received beyond the grad contour of that station.

§ 74.1103 Requirement relating to distribution of television sign by community antenna television systems

No community antenna television system shall supply to its subscril signals broadcast by one or more television stations, except in accorda with the following conditions:

(a) *Stations required to be carried.* Within the limits of its char capacity, any such CATV system shall carry the signals of operating subsequently authorized and operating television broadcast and 100 w higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations wit whose principal community contours the system operates, in whole or part;

(2) Second, all commercial and noncommercial educational stations w in whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations wit whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational televi translator stations operating in the community of the system with 100 w higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a this section,

(1) The system need not carry the signal of any station, if (i) that a tion's network programing is substantially duplicated by one or m stations of higher priority, and (ii) carrying it would, because of lim channel capacity, prevent the system from carrying the signal of an i pendent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal pric which substantially duplicate each other, and (ii) carrying all such sig would, because of limited channel capacity, prevent the system from ca ing the signal of an independent commercial station or a noncommer educational station, the system need not carry all such substantially d cating signals, but may select among them to the extent necessary to pres its ability to carry the signals of independent commercial or noncommer educational stations.

(3) The system need not carry the signal of any television transl station if (i) the system is carrying the signal of the originating statio (ii) the system is within the grade B or higher priority contour of a sta carried on the system whose programing is substantially duplicated by translator.

(c) *Special requirements in the event of noncarriage.* Where the sy does not carry the signals of one or more stations within whose grade higher priority contour it operates, or the signals of one or more 100 higher power translator stations located in its community, the system offer and maintain, for each subscriber, an adequate switching devi allow the subscriber to choose between cable and noncable reception, u the subscriber affirmatively indicates in writing that he does not desire device.

() *Manner of carriage.* Where the signal of any station is required to
rried under this section,
(The signal shall be carried without material degradation in quality
ain the limitations imposed by the technical state of the art) ;
(The signal shall, upon request of the station licensee or permittee,
rried on the system on the channel on which the station is transmitting
re practicable without material degradation) ; and
(The signal shall, upon the request of the station licensee or permittee,
rried on the system on no more than one channel.
(*Stations entitled to program exclusivity.* Any such system which
ates, in whole or in part, within the grade B or higher priority contour
y commercial or noncommercial educational television station or within
ommunity of a fourth priority television translator station, and which
s the signal of such station shall, upon request of the station licensee
rmittee, maintain the station's exclusivity as a program outlet against
priority or more distant duplicating signals, but not against signals
al priority, in the manner and to the extent specified in paragraphs (f)
g) of this section.
(*Program exclusivity; extent of protection.* Where a station is en-
to program exclusivity, the CATV system shall, upon the request of
tation licensee or permittee, refrain from duplicating any program
oadcast by such station, on the same day as its broadcast by the station,
e CATV operator has received notification from the requesting station
e date and time of its broadcast of the program and the date and time
y broadcast to be deleted, as soon as possible and in any event no later
48 hours prior to the broadcast to be deleted. Upon request of the
V system, such notice shall be given at least 8 days prior to the date of
roadcast to be deleted.
) *Exceptions.* Notwithstanding the requirements of paragraph (f) of
ection,
(The CATV system need not delete reception of a network program if,
doing, it would leave available for reception by subscribers, at any
less than the programs of two networks (including those broadcast by
tations whose signals are being carried and whose program exclusivity
ng protected pursuant to the requirements of this section) ;
(The system need not delete reception of a network program which is
uled by the network between the hours of 6 and 11 p.m., eastern time,
s broadcast by the station requesting deletion, in whole or in part, out-
of the period which would normally be considered prime time for net-
programing in the time zone involved ;
(The system need not delete reception of any program consisting of
roadcast coverage of a speech or other event as to which the time of
ntation is of special significance, except where the program is being
taneously broadcast by a station entitled to program exclusivity ; and
(The system need not delete reception of any program which would
rried on the system in color but will be broadcast in black and white by
ation requesting deletion.

105 NOTIFICATION PRIOR TO THE COMMENCEMENT OF NEW SERVICE

CATV system shall commence operations or commence supplying to its
ribers the signal of any television broadcast station carried beyond the
B contour of that station, unless the system has given prior notice of
roposed new service to the licensee or permittee of any television broad-
station within whose predicted grade B contour the system operates or
perate, and to the licensee or permittee of any 100 w or higher power
lator station operating in the community of the system, and has
shed a copy of each such notification to the Federal Communications
mission, within 60 days after obtaining a franchise or entering into
se or other arrangement to use facilities; in any event, no CATV
m shall commence such operations until 30 days after notice has been
. Such notice shall be given by existing systems which propose to
new distant signals at least 30 days prior to commencing service and
stems which propose to extend lines into obviously new geographic
within 60 days after obtaining a franchise or entering into a lease or

other arrangement to use facilities or, where no new local authorizat contractual arrangement is necessary, at least 30 days prior to comm service. Where it is proposed to extend the signal of any noncomm educational television station beyond its grade B contour into a comm with an unoccupied reserved educational television channel assig under § 73.606 of this chapter, the notice shall also be served upo superintendents of schools in the community and county in which the s will operate and the local, area, and State educational television ag if any. The notice shall include the name and address of the s identification of the community to be served, the television signals distributed, and the estimated time operations will commence. W petition with respect to the proposed service is filed with the Comm pursuant to § 74.1109 of this chapter, within 30 days after notice service to subscribers shall not be commenced until after the Commi ruling on the petition or on the interlocutory question of temporary pending further procedures; *Provided*, however, that service shall commenced in violation of the terms of any specified temporary relie the provisions of § 74.1107 of this chapter. Where no petition pursu § 74.1109 has been filed within 30 days after notice, service may be menced at any time thereafter, subject, however, to the provisio § 74.1107. The provisions of this section do not apply to any signals were being supplied to subscribers of the CATV system on March 17

NOTE 1.—As used in § 74.1105, the term "predicted grade B contour" means t intensity contour defined in § 73.683(a) of this chapter, the location of which is det exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND MISSION APPROVAL IN TOP 100 TELEVISION MARKETS; PROCEDURES

(a) No CATV system operating within the predicted grade A cont a television broadcast station in the 100 largest television markets extend the signal of a television broadcast station beyond the gr contour of that station, except upon a showing, approved by the Comm that such extension would be consistent with the public interest, and cally the establishment and healthy maintenance of television bro service in the area. Commission approval of a request to extend a in the foregoing circumstances will be granted where the Commission consideration of the request and all related materials in a full evid hearing, determines that the requisite showing has been made. The size shall be determined by the rating of the American Research B on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed af CATV system has obtained any necessary franchise for operation entered into a lease or other arrangement to use facilities and sh forth the name of the community involved, the date on which a fra was obtained, the signal or signals proposed to be extended beyon grade B contours, and the specific reasons why it is urged that such ext is consistent with the public interest. Public notice will be given filing of such a request, and interested parties may file a response or ment within 30 days after such public notice. A reply to such respo statement may be filed within a 20-day period thereafter. The Comm shall designate the request for an evidentiary hearing on issues specified, with the burden of proof and the burden of proceeding w introduction of evidence upon the CATV system making the request, otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisi paragraph (a) of this section, shall extend the signal of a television cast station beyond the grade B contour of that station, where the mission, upon its own motion or pursuant to a petition filed under § 7 determines, after appropriate proceedings, that such extension would consistent with the public interest, taking into account particular establishment and healthy maintenance of television broadcast ser the area.

(d) The provisions of paragraphs (a) and (b) of this section sh be applicable to any signals which were being supplied by a CATV

its subscribers on February 15, 1966, and pursuant to a franchise (where essary) issued on or before that date; provided, however, that any new nchise or amendment of an existing franchise after February 15, 1966, to rate or extend the operations of the CATV system in the same general a does come within the provisions of paragraphs (a) and (b) of this tion; and provided further that no CATV system located in the 100 gest television markets, which was supplying to its subscribers on Feb- ry 15, 1966, a signal carried beyond its grade B contour, shall extend service to new geographical areas where the Commission, upon petition d under § 74.1109 by a television broadcast station located in the area l after consideration of the response of the CATV system and appropriate ceedings, determine that the public interest, taking into account the siderations set forth in the second report and order in dockets Nos. 95, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served appropriate conditions limiting the geographical extension of the system new areas. In the event that an evidentiary hearing is held on such a ition, the Commission may also consider, upon the basis of the pleadings ore it, whether temporary relief pending the outcome of the hearing is ed for in the public interest, and, if so, the nature of such relief; no TV system coming within the foregoing provision shall extend its service new geographical areas in violation of the terms of the specified temporary ef.

.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES

a) Upon petition by a CATV system, an applicant, permittee, or licensee television broadcast, translator, or microwave relay station, or by any er interested person, the Commission may waive any provision of the s relating to the distribution of television broadcast signals by CATV tems, impose additional or different requirements, or issue a ruling on a plaint or disputed question.

b) The petition may be submitted informally, by letter, but shall be ompanied by an affidavit of service on any CATV system, station licensee, mittee, applicant, or other interested person who may be directly affected he relief requested in the petition should be granted.

c) (1) The petition shall state the relief requested and may contain rnative requests. It shall state fully and precisely all pertinent facts and siderations relied upon to demonstrate the need for the relief requested l to support a determination that a grant of such relief would serve the lic interest. Factual allegations shall be supported by affidavit of a son or persons with actual knowledge of the facts, and exhibits shall erified by the person who prepares them.

2) A petition for a ruling on a complaint or disputed question shall set h all steps taken by the parties to resolve the problem, except where the y relief sought is a clarification or interpretation of the rules.

d) Interested persons may submit comments or opposition to the petition hin 30 days after it has been filed. Upon good cause shown in the ition, the Commission may, by letter or telegram to known interested sons, specify a shorter time for such submissions. Comments or opposis shall be served on petitioner and on all persons listed in petitioner's lavit of service, and shall contain a detailed full showing, supported by lavit, of any facts or considerations relied upon.

e) The petitioner may file a reply to the comments or oppositions within days after their submission, which shall be served upon all persons who e filed pleadings and shall also contain a detailed full showing, supported affidavit, of any additional facts or considerations relied upon. Upon d cause shown, the Commission may specify a shorter time for the filing reply comments.

f) The Commission, after consideration of the pleadings, may determine ther the public interest would be served by the grant, in whole or in part, lenial of the request, or may issue a ruling on the complaint or dispute. Commission may specify other procedures, such as oral argument,

evidentiary hearing, or further written submissions directed to partic aspects, as it deems appropriate. In the event that an evidentiary hearin required, the Commission will determine, on the basis of the pleadings such other procedures as it may specify, whether temporary relief sh be accorded to any party pending the hearing and the nature of any temporary relief. Where a petition involves new service to subscri (other than service coming within the provisions of § 74.1107(a) of chapter), the Commission will expedite its consideration and promptly i a ruling either on the merits of the petition or on the interlocutory ques of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition respect to service coming within the provisions of § 74.1107(d) of chapter, opposition to such request for temporary relief shall be filed wi 10 days and reply comments within 7 days thereafter. The Commission expedite its consideration of the question of temporary relief.

III. Part 91 is amended as follows:

1. In section 91.557, paragraphs (a) and (b) are amended to read as foll and a new paragraph (i) is added as follows:

§ 91.557 Definitions

As used in §§ 91.559 and 91.561:

(a) *Community antenna television systems.* The term "community tenna television system" ("CATV system") means any facility wh in whole or in part, receives directly or indirectly over the air and amp or otherwise modifies the signals transmitting programs broadcast by or more television stations and distributes such signals by wire or cab subscribing members of the public who pay for such service, but such shall not include (1) any such facility which serves fewer than fifty scribers, or (2) any such facility which serves only the residents of or more apartment dwellings under common ownership, control, or mai ment, and commercial establishments located on the premises of suc apartment house.

(b) *Television station; television broadcast station; television trans station.* The terms "television station" and "television broadcast stat means any television broadcasting station operating on a channel regu assigned to its community by § 73.606 of this chapter. The term "telev translator station" means a television translator station as defined in § 7 of this chapter. A television translator station which is licensed to rebroadcasts the programing of a television broadcast station within station's grade B contour, shall be deemed an extension of the origin station.

* * * * * * *

(i) *Distant signal.* The term "distant signal" means the signal television broadcast station which is extended or received beyond the g B contour of that station.

2. In section 91.559, paragraphs (a), (b)(3), (c), (e), and (f) are amen paragraphs (g)(4) and (h) are added; and the note to section 91.559 is del

§ 91.559 Authorizations for operational fixed stations to relay vision signals to CATV systems * * *

(a) *Stations required to be carried.* Within the limits of its ch capacity, any such CATV system shall carry the signals of operatin subsequently authorized television broadcast and 100 w or higher p translator stations in the following order of priority, upon request o licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations w whose principal community contours the system operates, in whole part;

(2) Second, all commercial and noncommercial educational sta within whose grade A contours the system operates, in whole or in

(3) Third, all commercial and noncommercial educational stations w whose grade B contour the system operates, in whole or in part; a

(4) Fourth, all commercial and noncommercial educational translator ations operating in the community of the system with 100 w or higher ower.

(b) *Exceptions.* * * *

* * * * * * *

(3) The system need not carry the signal of any television translator ation if (i) the system is carrying the signal of the originating station, r (ii) the system is within the grade B or higher priority contour of a ation carried on the cable whose programing is substantially duplicated the translator.

(c) *Special requirements in the event of noncarriage.* Where the system oes not carry the signals of one or more stations within whose grade B or igher priority contour it operates, or the signals of one or more 100 w or igher power translator stations located in its community, the system shall fer and maintain, for each subscriber, an adequate switching device to llow the subscriber to choose between cable and noncable reception, unless ie subscriber affirmatively indicates in writing that he does not desire is device.

* * * * * * *

(e) *Stations entitled to program exclusivity.* Any such system which erates, in whole or in part, within the grade B or higher priority contour of ıy commercial or noncommercial educational television station or within e community of a fourth priority television translator station, and which rries the signal of such station shall, upon request of the station licensee permittee, maintain the station's exclusivity as a program outlet against wer priority or more distant duplicating signals, but not against signals equal priority, in the manner and to the extent specified in paragraphs) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is en- tled to program exclusivity, the CATV system shall, upon request of the ation licensee or permittee, refrain from duplicating any program broad- st by such station on the same day as its broadcast by the station, if the ATV operator has received notification from the requesting station of the te and time of any of its broadcast of the program and the date and time any broadcast to be deleted, as soon as possible and in any event no ter than 48 hours prior to the broadcast to be deleted. Upon request of e CATV system, such notice shall be given at least 8 days prior to the te of any broadcast to be deleted.

(g) *Exceptions.* * * *

* * * * * * *

(4) The system need not delete reception of any program which would be rried on the system in color but will be broadcast in black and white by e station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with icrowave service, either directly or indirectly, if the operation of such ATV system would be inconsistent with § 74.1107 of this chapter.

ection 91.561 is amended to read as follows:

91.561 NOTIFICATION BY APPLICANT

An application for any authorization subject to § 91.559 shall contain statement that the applicant has notified the licensee or permittee of any levision broadcast station, within whose predicted grade B contour the ATV system(s) served or to be served operate or will operate, and the ensee or permittee of any 100 w or higher power translator station operat- g in the community of the system, of the filing of the application. Where is proposed to extend the signal of any noncommercial educational tele- sion station beyond its grade B contour into a community with an un- cupied reserved educational television channel assignment under § 73.606 this chapter, the notice shall also be served upon the superintendents of hools in the community and county and the local, area, and State educa- nal television agencies, if any. Such statement of the applicant shall be pported by copies of the letters of notification directed to such licensees or

RE.—Appendix C contains the pertinent rules as subsequently nended by Memorandum Opinion and Order released April 21, 66 (31 F.R. 6313).]

permittees and educational interests. The notice shall include the fac
intended filing by the applicant, identification of each CATV system se
or to be served under the authorization sought, identification of the c
munity served or to be served by each such CATV system, and the televi
station(s) whose programs will be distributed by each such CATV sys

NOTE.—As used in § 91.561, the term "predicted grade B contour" means the
intensity contour defined in § 73.683(a) of this chapter, the location of which is d
mined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLE

I dissent from the action asserting jurisdiction over commun
antenna systems. In my opinion, the Communications Act does
now confer such jurisdiction and the Commission is without autho
to promulgate these rules.

I believe that we should seek legislation to resolve the basic c
siderations in this matter. Since the real concern surrounding CA
appears to be its possible evolution into pay-TV, I propose an amc
ment of the Communications Act to preclude community antenna
tems from distributing programs other than those received from tr
missions of broadcast stations.

I am opposed to the rule's impediments on entry of community
tenna systems into the top 100 markets, and specification of the grad
contour, rather than the grade A or lesser contour, as the benchm
for requiring carriage of local TV stations.

STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN P
DISSENTING IN PART

I concur in the steps the majority has taken, but must dissent to
failure to take other measures which I believe to be critically
portant. I think we are, indeed, at a crossroads in the developmer
our television system—and I gravely fear that the majority has ta
a wrong turn.

The Commission has had a sorry record with respect to CATV.
the early 1950's when questions were first raised about CATV,
Commission's staff recommended that the agency assert and exer
jurisdiction over this new phenomenon.[1] However, the Commis
of that day, not recognizing the potential impact of widespread C
development, procrastinated and finally declined to assert gen
jurisdiction. At first, the consequences of that decision were
readily apparent—and were largely confined to small television m
kets where CATV, in most cases, performed its true supplem
function. Later the impact of CATV competition assumed
serious proportions, and the Commission began to shake off its
argy. In the *Carter Mountain* case[2] it denied an application f
microwave facilities to serve CATV systems in Wyoming on
ground that the increased competition to a small market telev
station which would have resulted might have impaired its abilit
continue to serve its audience. It indicated that it would grant
applications on conditions designed to protect the station by requi

[1] See Television Inquiry, hearings before the Committee on Interstate and Foreign
merce, U.S. Senate, 85th Cong., pt. 6, p. 3490 *et seq.*
[2] *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*,
2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963).

the CATV systems carry the local station without degradation of signal and without duplicating its programs.

hen last April, after more than 2 years of consideration of ominous comments and special studies by the Commission and the adcast and CATV industries, we adopted minimal rules with respect microwave-fed CATV systems and proposed to extend them to he-air systems as well. It seemed to me—as I'm sure it did to adcasters who had become increasingly alarmed by the explosive wth of CATV and its extension into larger and well-served mar—that the Commission had finally taken hold of the problem, 14 s late, but in time to prevent serious damage to the fabric of our vision service. The Commission was divided four to two, but the ority, after considering and carefully laying out the unfair comtive impact of noncarriage of local stations or duplication of their grams, adopted rules which I think would have gone far toward erving the system so painfully developed in this country—and noting its further growth in the UHF. These rules would neither destroyed existing CATV systems, nor deprived their subscribers ny programs. Similarly, they would not have blocked all future TV development, but would simply have moved toward insuring cable systems perform the valuable supplemental service for which were originally devised. A reading of our first report and order ockets Nos. 14895 and 15233, 38 F.C.C. 683, with its careful analysis mpetition between broadcast stations and CATV systems—with icular emphasis upon the program exclusivity obtained in the ket by broadcasters and its importance to their operations—gives he clear impression that the majority was concerned first and fore- with the preservation and expansion of our over-the-air television m. While it recognized the important service CATV systems supply to their subscribers, it insisted that CATV was secondary subordinate in rank, and should therefore be subjected to quite st restrictions to favor the primary service.

it now, less than a year later, the tone is different. In the report order now issued—and even more in the deliberations leading up he decisions reflected there—there has been a shift in emphasis. re is a subtly heightened importance assigned to the diversity of e which cable systems provide to *some* television homes,[3] with rresponding depreciation of the local service of area stations. re are expressions of concern that we not block the "new" techgy of wired television—though the alternative of wired versus dcast distribution has long been with us, both in radio and tele-n, and it seems to me that CATV's technology, like its programis derivative and much less exciting in its possibilites than the -the-air mode. And there is a tendency to downgrade program sivity—which seemed so important last April—and to forget nfair competitive impact on broadcast operations of the CATV

[3] Indicated below, I think this is largely due to the vociferous protests, instigated by ding publicity efforts of certain elements of the CATV industry, of these cable subs. While they are a small percentage of the television homes in this country—and y a minority even in the television markets where they are concentrated—they are umerons enough to have flooded Congress and the Commission with protests against s which they were told we were about to take, but which were always exaggerated and mes completely false.

practices which we then undertook to regulate. The shift is
obvious in the reduction in the degree of nonduplication protec
which is now to be afforded local broadcasters.

Why this change in attitude? I suppose it could be argued tha
colleagues who now feel that same-day nonduplication is more i
public interest than the 15 days before and after local broad
which we specified last April were simply uninformed when they
that action, and therefore made a mistake. They do not advance
explanation, and I am sure it was not true. In fact, they gave n
more careful attention to consideration of the details of broadcast
CATV operation last year than they did on this round of discuss

It would be more normal for such a change in position to b
plained in terms of new information which has come to our atte
for the first time since our action of last year. This may be the
for what I regard as drastic impairment of the protection whic
then decided should be given to the exclusive program rights a
broadcaster has acquired in the program market—but, if so, it
not been explained to me in these terms. I cannot claim that I
read all the comments in this voluminous proceeding, but in th
was able to examine—drawn from both broadcaster and CATV
ings—and in the analysis of all the major comments prepared by
staff, I find no new factual data, and no new arguments, bearin
this issue which satisfactorily explain or justify the abandonme
the 15-day standard previously adopted. And, as suggested a
none of my colleagues have marshaled arguments which they
drawn from the comments to rationalize this new approach. In
they talk vaguely of balancing interests and minimizing disruptio
the subscribers of existing systems not yet subject to the rules, a
the importance of making network programs available to these
scribers on the day they are presented by the networks. If the
of these considerations is so important it seems strange to me tha
years we have knowingly permitted television stations to delay
work programs for the far more numerous over-the-air audi
Why has no one ever proposed a rule to prohibit this nefa
practice!

The fact is, of course, that except for certain live programs ha
an element of timeliness—all of which were excluded from the be
of delayed nonduplication, and are almost never delayed in pract
there is no real urgency about seeing a particular program on a
ticular day or at a particular time. There may be an element of
venience, but it is one of the disadvantages of the television me
that the viewer must try to adjust his schedule to fit the times so
else—at a network or a local station—has selected for the presenti
of his favorite programs, and can change at will. It *is* impo
that as many network programs as possible be made available in
market. But as I shall point out below, the nonduplication rule
adopted seems to me to be based on the concept that it is better
the cable subscribers, who are a minority, be able to see every net
show on its day of origination than that they be furnished every
show, but with some of them delayed for a short period in order to
more of the most popular shows available to *everyone* in the m
nonsubscriber and subscriber alike.

would like to discuss in detail the discussion, in the first report
order in the microwave dockets, of the period of nonduplication
tection to be required, but time does not permit it. Certainly this
one of the longest and most carefully reasoned sections in the
cument, occupying nine pages in the printed report (see pars. 101
27). I find the explanation now offered for abandoning the result
e reached so insubstantial as to be shocking. Consider what the
ority says in paragraphs 51 to 56. They start by saying that
ultaneous nonduplication is clearly called for—which is hardly
tling since even NCTA concedes this. It then notes that in the
report we further determined that "some measure of protection
ond simultaneous nonduplication would also serve the public in-
st on a number of grounds." I think that sets some sort of record
delicate understatement. After carefully considering the data
mulated in over 2 years, we explicitly found that *15-day* non-
lication, before and after local broadcast, was reasonably necessary
achieve fair competition and preserve the local broadcasters'
l-won program exclusivity.

ow the majority say they have reconsidered and made a different
nce, "in light of the fact that the rules are now being made appli-
e to a large number of existing systems and will affect their exist-
service to the CATV viewing public." Well, that was certainly
oughly understood in April 1965, when we proposed to extend
microwave rules to the off-the-air systems, and to apply them to
rowave service being provided under grants made prior to De-
ber 1963. That was the object of the exercise! Why the sudden
ouncement—as if discovered for the first time—that compliance
the rules "would tend to substantially disrupt the viewing habits
he CATV subscribers." While I don't think the "disruption" is
reat as is suggested, and am satisfied that the subscribers would
become accustomed to the new schedules, certainly we knew a year
that *some* change would be effected by the rules—otherwise why
o the bother of adopting them. All we have learned since then is
, by the application of some misleading publicity techniques, sev-
hundred thousand subscribers were frightened into sending pro-
—usually form letters or cards thoughtfully supplied by the
TV operator—to the Commission or the Congress. While I am no
e anxious to face the wrath of an aroused public than anyone else, I
k some hazard of that kind is involved in making judgments de-
ed to serve the overall public interest but which injure or offend
e part of the public. Furthermore, I think it could be demon-
ted to the people concerned that their fears were exaggerated—
that in a rather short time they would adjust to the few scheduling
nges which would actually be involved.

n other words, I agree that we should avoid *unnecessary* disruption
stablished viewing habits, but not that we should do so "as much
ossible"—which to the majority apparently means that such con-
for established, if fleeting, habits of a very small part of the
vision audience should shape national television policy, not just
them but for all future subscribers of all future systems as well.
majority says it seeks to preserve "the valuable public contribu-

tion of CATV in providing wider access to nationwide program
I agree that far, but not that there is any necessity for insur
wider selection of programs on any particular day for a favored
when I believe it will deprive others of the opportunity, othe
available, to see certain programs at all. The basic objective o
mitting CATV systems to provide greater access to network prog
can be fully achieved, as was pointed out in the first report, i
15-day nonduplication.

The majority then blandly announces that "balancing all the
tinent considerations," they think nonduplication should be cut t
same day for existing systems. I don't know what they bala
since all they have discussed is the danger that some CATV
scribers—certainly not all of them—would have been required to
some network programs—certainly not all of them—at the times
are broadcast by the local station or stations rather than at the
the cable system would otherwise have brought the programs in
distant stations. The only argument then advanced in favor o
result is that it will eliminate the great bulk of delayed nonduplic
requests, citing paragraph 125 of the first report. I think this
argument for the opposite result! Paragraph 125 read as fol

> 125. There remains the question of the precise extent of the restri
> to be imposed upon nonsimultaneous duplication. After examinin
> question carefully, we believe that the 15-day before-and-after perio
> posed in our last notice should be adopted. In dealing with networ
> grams, our sample week study shows that, of all the hours of d
> network broadcasts, 10.2 percent were delayed less than 1 day, 48.9 p
> were delayed from 1 to 7 days, 30.2 percent were delayed 8 to 15 day
> 10.7 percent were delayed over 15 days. A more detailed distri
> shows that the number of hours of delayed network broadcasts f
> sharply at the end of a 7-day period of delay and once again at t
> of a 15-day period.

Thus our study showed that 79.1 percent of delayed network b
casts were delayed from 1 to 15 days, *and this was used as a prim
justification for the 15-day protection adopted.* Now it is argue
reducing the protection to the same day is good because it avoids
ing with the problem the rule was designed to handle in the first p
The majority notes, "as an incidental benefit," that this will also
stantially reduce the areas of possible dispute between broadc
and CATVs in complying with the rules." Quite so—but t
achieved by cutting the heart out of this part of the rules and red
the rights of the broadcasters to such a low level that their oppo
ties for causing "disputes" are very slight. What seems odd to
that we achieve this happy accommodation by favoring the pa
this prospective "dispute" whom the first report found to be eng
in unfair competition in the area of program duplication, to the d
vantage of the party whose program rights the rules were desig
protect.

The majority then concedes that its concern about disruptio
result of 15-day nonduplication would not apply to new systems
into service hereafter. Thus even if we must defer to the private
ests of a relatively few people in not having their viewing habits r
fied in the slightest, it is clear that the more effective protection

olicy adopted in the first report could be applied to new systems since eir subscribers would have no established viewing patterns. But te majority does not even adhere to policy in this partial fashion. ney say that even here there would be disruption because the subsriber may not be able to view programs from distant stations at the nes specified in his TV guide. They are so solicitous of the future bscriber that, again, they completely overlook the interests of the nsubscriber. What about the "disruption" suffered by the resident a sparsely settled area who has no cable service, or the urban viewer no can't afford such service, and who read in this same unspecified V guide [4] of programs carried on distant stations on the cable but hich are not available to them on the local station(s), though they ould have been if the local broadcaster's first-run rights had been adeately protected? There has been a lot of talk that the Commission's gulation of CATV operations would make second class citizens of ble viewers. It seems to me that the majority has gone overboard in te other direction by shaping policy to accord a ridiculous degree of portance to these people's assumed interests. It's hard for me to ep for the cable subscriber who is going to receive more stations—ough probably no more real services—than the people of New York ty but who, we are now told, must not only have this wealth of proam choice but must also have every program available to him the me day it is made available to viewers in New York.

I would like to expand upon the impact I think this curtailed proction will have on the nonsubscriber. In one- and two-station marts the local broadcaster tries to put together the best possible schedule r his viewers, drawing on more than one network. Since conflicts e almost inevitable between the more popular programs of the comting networks, this has customarily meant that most of the programs e presented at the time of network feed, if the station is interconcted, but some are broadcast on a delayed basis. While some CATV terests have sought to denigrate this practice by calling it "cherry cking," it seems clear to me that it has served—and would continue serve—the public interest by making available in markets with less an three stations the best of the offerings of all three networks. And layed broadcasting serves the public even in a three-station market, permitting the local affiliate to rearrange the network schedule, to e limited degree his network and its advertisers will permit, in order present a service which he thinks is more in the interest of his local dience. I think such local flexibility is in the public interest and ould be preserved. A couple of years ago the Commission abolished tion time and struck down CBS's incentive compensation plan beuse, in part, they impaired the local station's independence in reachg decisions as to clearance for programs offered it by its network. I ink the clear result of the restricted nonduplication protection now ing afforded will be to impel every station located in a three-station arket and carried on CATV systems serving a substantial percentage its audience to clear live for all the network shows it plans to pre-

[4] Certainly if 15-day protection were afforded the CATV operator would not publicize ally any programs he could be required to delete, but would tell his subscribers when y could watch the programs on the cable on the *local* station.

sent. I do not think this straightjacketing of the local broadcaste desirable.

I think the impact will be even greater in markets with one or stations. To the extent they now delay network programs—which day nonduplication was specifically designed to protect—I think s stations have been providing a service to their audiences. I think t will now be sharply restricted in their ability to continue this servic if not totally precluded from doing so. As long as only a small p of their audience is served by cable systems, they can probably conti to present programs on a delayed basis even though some of t potential viewers will have seen the program a short time earlier. if and when cable subscribers become a really significant factor in market—and such operations are expanding at a rapid pace—then broadcaster will not, I think, be able to continue to present progr selected from more than one network. It will be difficult enoug compete with the current offerings of a substantial number of dis stations—probably located in a larger market—without trying to d with a program which a third, a half, or more of the local stati audience have already had an opportunity to watch. The major in paragraph 51, tries to shore up its argument about "disruption to new systems by saying that it is because of such concerns that s broadcasters, although entitled to 15-day protection, have reque only simultaneous nonduplication. In paragraph 116 of the first port we stated that NCTA had shown "a few instances" of such cessions by broadcasters, but did not regard this as of decisional portance. In the cases I know of where broadcasters who were titled to *no* protection under the rules were able to bargain simultaneous nonduplication, the result has been that they presen delayed programs, or at most one or two.

The majority seeks to support its refusal to give greater nondup tion protection as to new CATV systems by arguing that it is obvio preferable to have one set of rules for all systems. Of course I w prefer that, too, though I think the single rule should provide fo day protection. But we quite often adopt tightened rules which w bear harshly on existing operations, and in most cases we handle problem by grandfathering the situations which have already de oped and applying the new rule prospectively. That is exactly w we could do here—and should do since my colleagues are unwillin inconvenience the subscribers of existing cable systems. This is c mon governmental practice, and often involves much more substan discriminations than would be the case here.

The majority then turns to the question whether it should re 15-day nonduplication protection for nonnetwork programing. decides not to do so for the surprising reason that it afforded min protection at best. In other words, having given very restricted duplication protection to nonnetwork programs out of concern CATV systems (see par. 123, first report), the Commission now v draws even that effort to insure the local station of a small frac of the program exclusivity for which it has bargained. Why, then we make this provision last April, when we knew as much about aspect of the matter as we do now? I agree that 15 days is no eno

and am satisfied that we will do serious damage to the present method program distribution unless we give the broadcaster at least protion of his right to be the first to present each program he purchases his market. The majority says it has determined that we must ok elsewhere if we are to achieve effective relief in this respect. This iers to some extension of the concept of permission to rebroadcast to ble operations. I think that this requires legislation, which may e a long time—and in any event I do not think it will necessarily ovide the protection the majority seems to be seeking—though not y aggressively. The legislative proposal we have submitted to ngress calls attention to the problem but makes no specific recomndation. In paragraph 152(iii) the majority concedes that they not in a position to state whether a section 325(a) approach would effective and fully consistent with the public interest. That being case, I do not think they are in a position to abandon the only otection now given the broadcaster—minimal though it is.

The majority drops an interesting footnote to paragraph 55, in ich it says that same-day nonduplication affords "substantial" protion to the most popular network programing so that "*most* network affiliated stations should be viable." [Emphasis supplied.] It st be encouraging to broadcasters faced with serious and growing ATV competition to know that the majority thinks that not too ny of them will go under—with loss not only to the businessmen ncerned, but also to the local audiences they serve.

In paragraph 56 the majority concedes that conflicting public conerations are presented—though they have carefully avoided mening a single factor favoring retention of 15-day protection—and nclude that their resolution constitutes a fair compromise. I fail to much evidence of this alleged balancing of competing interests. It ms to me that zeal to avoid at all costs any disruption to existing ble subscribers has carried the day. I don't think this matter was lly in issue at this stage of the proceeding. We did indicate that wanted comments as to policy with respect to duplication of proms broadcast by the local station in black and white but available color on a distant station on the cable. The parties duly addressed mselves to this question. But as to the extent of nonduplication otection, I think the general understanding was that we had reached areful decision of this issue last April in adopting the microwave es, and that if we adhered to our tentative conclusion as to jurisdicn over all CATV, there would be no change in this provision of the es unless (1) experience with the microwave rules uncovered flaws, (2) someone demonstrated that off-the-air systems are so different t these rules could not appropriately be carried over to them. I ow of no evidence of the former, and no one seriously tried to estabh the latter—not even the NCTA, which simply incorporated the guments it made to Congress last May in an effort to show that cern stations had prospered without delayed nonduplication.

But without any such showing of a need for change in the comments d in the proceeding, the majority has abandoned the position it veloped so carefully last year. I suppose this simply proves the wer of the pen when wielded by thousands of indignant members

of the public—even when they have been intentionally misled in writing in the first place. I think this provides an interesting—thou rather depressing—chapter for students of the administrative proce

I agree that same-day nonduplication takes care of the time zo differential problem, but that's about all that it does over and abo simultaneous nonduplication which NCTA was willing to conce months ago. The majority says it will afford the station affiliated wi more than one network "some leeway" in presenting the most attr tive programs of each, but then indicates just how much leeway t broadcaster has by reminding him that he must present it the same d the network did and that prime-time programs must be broadc entirely within prime time. It may be that he can shoehorn in a f programs on this basis, though I believe it will require some chan in policy by some of the networks—and will certainly involve add expense for the station. Thus if it has been delaying network p grams through the use of film, it would have to buy a videotape m chine—and that's no small expense item, especially if he has to be al to handle color in order to be entitled to protection. Further, unl the network in question provides him an advance feed, he will ha to have two loops into his studio, one for the live broadcast going over the air and the other to feed the tape machine with a progr coming in at the same time from another network. Since one- a two-station markets are usually small, this may pose serious proble for the broadcaster, and he may simply throw up his hands and ca the full schedule of a single network to avoid trouble and expen If he does, the public will lose by it—and so will he, in terms of lowe average audience. I much prefer the greater flexibility permitted the 15-day rule, and do not think the majority has even addressed the selves to this problem—much less assured themselves that what t speak of is feasible.

The majority inserts another footnote at this point, noting that t amount of delayed network broadcasting in the median one- or tw station markets is about 5½ hours and 11 hours per week, respectiv They cite paragraph 108 of the first report, which also shows that one-station markets the range was from ½ to 23½ hours, and in tw station markets, from 1 to 42½ hours. So when they concede that median is not insignificant and that there will be some detriment the public if the local station curtails delayed broadcasts, they m also recognize that for half the markets involved (84 one-station and two-station) the impact will be more severe. Nonetheless, they cons themselves with the thought that the amount of delayed broadcast not too large in the median market. But what puzzles me is that it w unwillingness to "disrupt" established viewing patterns as to these v same programs which led them to cut back on nonduplication prot tion. If they worry about showing these 5½ or 11 hours of progra ing at later times to CATV subscribers, why are they so nonchal about the risk that the equal, or greater, number of nonsubscribers n lose all, or a substantial part, of that programing? I would th that any sensible balancing of equities here would favor the nons scribers.

The other area of my disagreement with the majority concerns their
etment of the major market, distant stations issue. Since they will
o more, I support what they have done. However, I would have
ored a broader rule—which I am sure that would be easier to ad-
inister than the policy of multiple petitions, waiver requests, and
rings to which we are now committed.
ertain of the broadcast entities filing comments in this proceeding
ed us to exercise our authority under section 303(h) of the act
establish areas or zones to be served by any stations." It was
ously suggested that this be done by limiting CATV systems to
niage of stations providing a specified signal over the communities
hich they are located, or by specifying a maximum mileage be-
d which no station's signal should be extended. This is clearly
spect of our responsibility for allocations—an area in which even
ics of the Commission concede our authority, and in fact recognize
the agency was created primarily and specifically for this purpose.
have thus far exercised this authority in television by establishing
refully designed table of channel allocations and by fixing maxi-
n limits on heights and powers. While there are many situations
hich deficiencies in service can and should be corrected by supple-
tal means such as CATV, satellites, and translators, I do not
ve that any of these auxiliary services should be permitted to
pt the basic television system that Congress, the Commission, and
roadcasters have worked so hard to establish.
is precisely because one of these supplemental services, CATV,
taken a new and unexpected course that we are involved in this
eeding. I think its explosive development poses a threat of dis-
ion to our television broadcast system, and that this is therefore the
to take hold of the problems presented and to fit cable operations
an appropriate place in the overall television structure. While
majority has undertaken to deal with part of these problems, I
k it is not doing so in allocations terms and will, as a result, be un-
to deal with the situation soundly, consistently, and expeditiously.
e majority contents itself with saying that CATV entrepreneurs
ing to bring distant signals—that is, signals carried beyond the
inating stations' grade B contours—into the top 100 television
kets will be required to demonstrate, in an evidentiary hearing,
they will not impair UHF development there or serve as a spring-
d to pay-TV. I would greatly prefer an approach which would
new systems—for a 5-year period which would allow time for
F growth and, perhaps, resolution of the copyright question—
extending any station's signal beyond its grade B contour, except
authorization by the Commission in certain carefully defined
tions. For example, I think we should permit greater extension
rvice by CATV systems where they carry signals into communities
receiving three network service over the air. But without some
limitation which would stem the proliferation of cable systems
eas already receiving substantial television service, I am afraid
CATV will stunt future growth of our free television system, and
aps even impair the viability of some of the stations now serving
ublic.

Even assuming that we should employ the majority's hearing p
cedure, instead of a rule which I think might be sounder legally
certainly simpler to manage, I would not cut it off at the top
markets. While it is true that much current UHF activity is cente
in these major markets, and that the risk of CATV becoming p
TV on the basis of signals appropriated from the broadcaster
greatest there, I think there are compelling reasons for treating
smaller markets in the same way.

It seems to me that the majority's concerns about economic imp
and fair competition apply with even greater force in these sma
markets. Certainly many of the more than 130 stations in t
markets are marginal operations, and therefore much less able
withstand duplication of their programs and fragmentation of t
audiences than the more profitable stations in larger cities. I th
fore do not think it is logical to subject them to greater exposur
CATV competition than the stations in major markets, which
well be the effect of the majority's different treatment of the sma
markets.

One ground for this cutoff at the 100th market given by the majo
is the fact that any delay incidental to the hearing procedures requ
is mitigated by the fact that the major markets generally hav
considerable amount of service now, plus the prospects of new ser
However, most of the markets from 75 to 100 have not more t
3 existing stations, while 20 markets below 100 also have 3 or 4
tions. It is true that the larger the market, the greater the likelih
that someone will be interested in building a fourth station. H
ever, there has been interest in UHF stations to provide a fo
service in markets as far down as the 93d, and it seems likely tha
favorable conditions can be maintained, in due course such deve
ments can be expected in still smaller markets. Similarly, there sh
eventually be interest in putting third stations on the air in th
small 2-station markets. Beyond that, the Commission has m
many allocations of single UHF channels to medium sized comm
ties, and is presently proposing a class of low-power community
tions to serve many more even smaller communities. Unless all t
plans are to fail, the purposes of Congress in enacting the all-cha
legislation to be frustrated, and this country to be left with a stu
television system, our regulation of CATV operations must cha
their growth in ways which will not add to the problems fa
upcoming UHF stations.

While the majority's proposal does not exclude the smaller mar
from all relief, it at the very least raises procedural difficulties w
I think impose unreasonable burdens on the very stations least
to bear them. In the first place, they must initiate the proceedin
consider the role of CATV in their market, while in the top 100 mar
this burden is upon the CATV applicants. Then it seems to be
gested that different presumptions apply here, or that the burde
proof is shifted to the broadcaster, whereas in the larger marke
is on the CATV operator. It seems to me that in *all* markets
burden should be upon the CATV interests to demonstrate that t
projected operations will not damage or destroy local broadcast ser

Of critical importance, of course, is what happens while the Commission is pondering these cases. In the major markets, presumably CATV activity must halt until we approve their entry. In the smaller markets, however, they can go ahead unless and until we act favorably on a request for stay.

Furthermore, the majority makes clear that in the top 100 markets private agreements between broadcasters and cable operators, though to be given weight, will not be controlling. However, this proviso apparently does not apply below the 100th market, and I'm afraid some broadcasters or prospective broadcasters in the smaller markets, faced with the added burdens outlined above, may try to work out arrangements whereby they will acquire partial interests in the CATV systems proposed for their areas in return, in part at least, for not instituting procedures to protect the CATV developments. While this may, to some degree at least, solve their personal financial problems, I am not sure it will adequately protect the public's interest in the available and potential free broadcast service. I certainly hope the small broadcasters will not take this course, but under the majority's procedures CATV can spread unchecked in these small markets unless someone—a broadcaster or a prospective applicant—goes to the trouble and expense of filing a protest.

One final thing concerns me about this different treatment of the smaller markets—I am afraid it will undercut our policy in the top 100 markets. If we permit the signals of the New York City independents to be put on CATV systems in smaller markets scattered around the country in areas falling between major markets, it seems to me this will create pressures to relax our policies so that the same service can be offered there. In paragraph 54 the majority justifies its failure to continue 15-day nonduplication as to new CATV systems by saying it would be anomalous to have different rules applicable to propose here. If they think that cable subscribers would object to mere delay in presenting programs that people in neighboring towns can see on the day of network release, what do they expect to happen when people in the top 100 markets find that they cannot get a service available to residents in smaller towns all around them?

The only way to deal realistically with this problem is to impose limits on the distance to which signals can be carried. I would treat all communities receiving usable services of the three networks alike, and require a showing in every case before permitting institution or extension of CATV operations employing distant signals.

Separate Statement of Commissioner Lee Loevinger re Second Report and Order in CATV Proceedings

I concur in the substantive provisions of the order but I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts.

The opinion (here called "second report") which purports to support the present order seems to me to illustrate many of the worst aspects of the institutional decision. The opinion does not really rationalize or justify the result reached, but rather accepts it some-

what grudgingly. This is a product of the fact that the opinion was originally drafted by the staff to support an entirely different result. Despite the efforts and instructions of the Commission, and a series of revised drafts, the instant opinion is substantially similar to the document which was written to support a different result. The opinion refers to little evidence and much of that is inconsistent, assumptions and speculation substitute for facts, the reasoning is circuitous and illogical, and the statement is so turgid and prolix that it does more to obscure than illuminate the subject. I can concur fully only in paragraphs 97, 98, 150, and 156 to the extent of my concurrence in the order.

What the Commission is doing in the instant order is to exercise its quasi-legislative powers. Consequently the decision to issue or join in the instant order is a legislative judgment. I concur in the substantive provisions of the order not because I think it is wholly logical or the best method of dealing with the subject, but because it seems to me to be the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission. This is, in my opinion, a legitimate basis for making a legislative judgment.

On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. (38 FCC 683, 746 (1965). Accordingly I adhere to that opinion and to the conclusions stated there.

The Commission rule requiring a hearing before CATV is permitted to commence operation in any of the 100 largest markets is particularly questionable. The ostensible justification is that CATV might become pay-TV. This reason is flimsy, since that danger—if it is a danger—could be met much more easily by less burdensome requirements.

Nevertheless the substantive position now adopted by a majority of the Commission seems to me to be the most moderate and reasonable compromise of sharply conflicting views and positions that has any practical chance of approval. It is of the greatest importance that the Commission now recognizes the necessity of requesting Congress to legislate on jurisdiction and other important aspects of this matter and has done so. In these circumstances, I think the most constructive and useful course is to support affirmative action by the Commission, leaving the jurisdictional issue to decision by Congress and the courts, and looking to Congress for further guidance as to regulatory matters. Accordingly I concur in the substantive provisions of the legislative rules now promulgated by the Commission.

APPENDIX C

74.1105, 74.1107 AND 74.1109 OF THE COMMISSION'S RULES

47 CFR §§ 74.1105, 74.1107 AND 74.1109

* * * * *

§ 74.1105 Notification prior to the commencement of new service

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter,

the notice shall also be served upon the superintend-
ents of schools in the community and county in which
the system will operate and the local, area, and State
educational television agencies, if any. The notice
shall include the name and address of the system
identification of the community to be served, the tele-
vision signals to be distributed, and the estimated
time operations will commence. Where a petition
with respect to the proposed service is filed with the
Commission, pursuant to § 74.1109 of this chapter
within thirty (30) days after notice, new service to
subscribers shall not be commenced until after the
Commission's ruling on the petition or on the inter-
locutory question of temporary relief pending further
procedures; *Provided, however,* That service shall not
be commenced in violation of the terms of any speci-
fied temporary relief or of the provisions of § 74.1107
of this chapter. Where no petition pursuant to
§ 74.1109 has been filed within thirty (30) days after
notice, service may be commenced at any time there-
after, subject, however, to the provisions of § 74.1107.
The provisions of this section do not apply to any
signals which were being supplied to subscribers of
the CATV system on March 17, 1966.

NOTE 1: As used in § 74.1105, the term "predicted
Grade B contour" means the field intensity contour
defined in § 73.683(a) of this chapter, the location of
which is determined exclusively by means of the cal-
culations prescribed in § 73.684 of this chapter.

*§ 74.1107 Requirement for showing in evidentiary
hearing and Commission approval in top 100 tele-
vision markets; other procedures*

(a) No CATV system operating within the pre-
dicted Grade A contour of a television broadcast sta-
tion in the 100 largest television markets shall extend
the signal of a television broadcast station beyond the

Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station be-

yond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall etxend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, pars. 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the fore-

going provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

[*§ 74.1107(d) as amended eff. 4–26–66; III(64)–13*]

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the

only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter),

he Commission will expedite its consideration and romptly issue a ruling either on the merits of the etition or on the interlocutory question of temporary elief pending further procedures.

(g) Where a request for temporary relief is con- ined in a petition with respect to service coming ithin the provisions of § 74.1107(d) of this chapter, pposition to such request for temporary relief shall filed within ten (10) days and reply comments ithin seven (7) days thereafter. The Commission ill expedite its consideration of the question of mporary relief.

(h) Where a petition for waiver of the provisions f § 74.1103(a) of this chapter is filed within fifteen 15) days after a request for carriage, the system eed not carry the signal of the requesting station ending the Commission's ruling on the petition or the interlocutory question of temporary relief ending further procedures.

Subpart K (§§ 74.1101–74.1109) as adopted eff. -18–66, except for § 74.1103 which is eff. 6–17–66 as pertains to existing operations of nonmicrowave ATV systems and §§ 74.1105, 74.1107, and 74.1109 hich are eff. 3–17–66; III(64)–12; § 74.1109(h) as dopted eff. 6–17–66; III(64)–13.]

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APPENDIX D

Comments of Midwest Television, Inc.

DOCKET NO. 15971, FILED JULY 26, 1965

[Excerpts]

(155)

* * * * *

V. The Commission Should by Rule Stay All Further CATV Activity With Provision for Appropriate Exceptions

A. THERE IS A VITAL NEED FOR EFFECTIVE INTERIM ACTION

29. The Commission has concluded that interim policies must be immediately implemented in order to place necessary restraints on CATV expansion pending the outcome of this proceeding. No other conclusion is possible in light of the virtually unrestrained mushrooming of CATV, in light of the very limited regulations now applicable to CATV and in view of the grave and immediate threat to the maintenance and development of UHF stations. Such an approach might not be necessary if CATV continued only within its historic role as a supplementary "fill-in" service. But that is not the case. Important CATV interests are intent upon making CATV a primary service, which will supplant instead of supplement free local and area television broadcast service. This is clear from repeated pronouncements of CATV industry leaders and from the direction in which CATV is moving.

30. If unchecked, the present trend will result, at the very least, in impairment of the service of existing local and area television stations and the frustration of UHF development. At worst, the present nationwide system of allocations and the principle of free television service provided by local and area stations attuned to the interests and needs of the areas they serve and provided to the entire public, whether rich or poor or urban or rural, will be replaced by a

wired television system, with programs originated in a few large metropolitan cities available only to those who can or will pay and only to those who live where there is sufficient population density to justify the laying of cables.

31. Appropriate carriage and non-duplication requirements, although essential to an effective system of CATV regulation, are not sufficient to meet these problems. CATV is increasingly importing and attempting to import distant stations into communities which are served by local and area television stations and into communities where the potential for the development of UHF stations is the greatest, as well as into communities which would be served by them and upon which UHF will depend for its development. Wholly apart from the mater of non-duplication and even if the Commission extends the period of non-duplication treatment as proposed above, the importation of distant stations will so fragment audience as to weaken the capacity of existing stations to serve the public or cause their demise and to preclude new UHF stations from going on the air or staying on the air if they do go on the air.

* * * * *

2. The critical situation in San Diego

40. Midwest's concern with the unrestrained proliferation of CATV is by no means confined to central Illinois. In Southern California, within the service area of Midwest's station KFMB–TV, San Diego, CATV has been growing at great speed. The first system in that area was franchised in March of 1963. Since then, seven additional systems have been franchised—one in September 1964 and two in just the last three months. All eight systems are within the Grade A contour of KFMB–TV, which falls within the metropolitan San Diego area; four of the systems are located in San Diego itself. System contruction

oes not of course begin until sometime after grant
f a franchise, and four of the eight San Diego area
ATV systems are not yet operative (though two of
ie four are expected to begin operating momen-
rily). Figures as to the number of subscribers these
stems have secured are not public and, although
idwest has tried to obtain current data, the informa-
on was not made available. As of February 1965,
ie number was roughly estimated at approximately
),000 homes. However, the installation of new cable
is been proceeding at a furious pace in recent
onths. Midwest engineering personnel recently
unted drops in a part of San Diego where CATV
id been available for only three months. Of 159
omes in that area, 58 were wired for CATV—and
is is an area where all three local stations can be
tisfactorily received. In the June 1965 survey made
r Midwest in the San Diego area by an independent
search organization,[1] 300 cable subscribers were in-
rviewed; 43 per cent had been subscribers for less
an three months.

41. Nor have the Commission's admonitions to local
thorities to proceed with caution curbed this activ-
y thus far. Only recently the San Diego County
pervisors approved a procedure for licensing
ATV's in the unincorporated areas of the county.
Broadcasting, July 5, 1965, p. 80).

42. The three local VHF stations which serve San
iego already face serious audience fragmentation as
result of the importation of both network-owned
id independent stations from Los Angeles and face
e threat of yet more severe effects in the immediate
ture as operating systems expand their operations
id as CATV systems which are franchised but not
t operating commence operations. All of this is true

[1] See footnote 2, p. 5, *supra*.

despite the fact that the stations are network affil
ated, are well-established and have strong ownershi
and management, and despite the further fact that th
San Diego market is a substantial one. Again, hov
ever, as in central Illinois, the most immediate effec
will be upon the development of new UHF servic
Construction permits are outstanding for two ne
commercial UHF stations to operate on Channels 3
and 51 in San Diego. Unless effective action is take
by the Commission, it is doubtful that either of thes
authorized UHF stations will go on the air or, if the
do, that their operations will be viable.

43. There can be no doubt of the threat which th
intensified activity poses to the development of UH
service in San Diego. The impact of rapidly expan
ing CATV on these *proposed* UHF stations can b
clearly seen from the severe audience losses whic
the three *existing* VHF network affiliated statio
face, as reflected in the June 1965 survey. Thr
hundred cable subscribers were asked, "Which cha
nel do you now use most?" Only 49 per cent nam
a San Diego channel; fully 55 per cent named
Los Angeles channel.[2] The same question was p
to two groups of non-CATV subscribers (150 in are
where there is CATV and 150 in areas where this
no CATV). San Diego stations were named by 1
per cent and 94 per cent, respectively, while Los A
geles stations were named by only 5 per cent a
11 per cent. The survey also asked about statio
used next most and third most frequently. T
results are dramatic:

[2] An additional 10 per cent made no choice. Percentages to
to more than 100 per cent because some multiple answers we
given.

Per Cent of Respondents Who Named a San Diego Station as One of the Three Stations That Were Used Most

(Station Named)	Non-Subscribers	CATV Subscribers
KFMB-TV	90%	44%
XOGO	89%	48%
KETV	77%	29%

44. Perhaps even more striking, with respect to the impact on the proposed independent UHF San Diego stations, is the fact that 25 per cent of the 300 CATV subscribers interviewed named a Los Angeles *independent* station as the channel they used most; only 1 per cent and 2 per cent respectively, of the two groups of non-subscribers did so. Moreover, 56 per cent of the CATV subscribers (as compared with 1 per cent of non-subscribers) named at least one Los Angeles independent as one of the three stations used most.

45. Other statistical approaches likewise reveal that independents in communities like San Diego will have a rough go, at best. During the one-hour period from 5:00 to 6:00 in the afternoon, Monday through Friday, there was no duplication by Los Angeles stations of the programs broadcast in San Diego. In other words, all stations in both cities could be considered "independents" during that period, and a cable subscriber could watch any one of *ten* different programs. The audience lost to the Los Angeles stations was staggering. Among non-subscribers surveyed, 95 per cent of those who watched television during that hour watched one of the San Diego stations. Of cable subscribers, however, the three San Diego stations accounted for only 48 per cent of total viewing; the Los Angeles stations accounted for 52 per cent—16 per cent for the network stations, 36 per cent for the independents. One Los Angeles station alone (an independent) accounted for 20 per

cent, surpassing two of the three San Diego stations (which had 12 per cent and 11 per cent, respectively). Even during the 9–10 P.M. period on Sunday through Wednesday, when all San Diego programs were network programs duplicated by Los Angeles stations, the Los Angeles independents accounted for 16 percent of viewing time. In short, the new independent UHF stations proposed for San Diego will, in homes that are or will be CATV subscribers, be attempting to enter a market where, at various times of the day, they will be attempting to compete for audience with ten other stations offering from seven to ten different programs to the public.

* * * * *

B. THE SCOPE OF THE PROPOSED PROCEDURES IS TOO NARROW

48. For the foregoing reasons, Midwest strongly supports the Commission's approach of immediately taking interim action to keep the situation from getting out of hand while it proceeds to consider final and comprehensive regulations to govern CATV. However, the action must be expanded in scope if it is to be truly effective.

* * * * *

C. A PROPOSED NEW INTERIM RULE

52. Accordingly, Midwest proposes that the Commission, by interim rule, issue a general stay against *all* further CATV activity where the CATV carries or proposes to carry the signal of any station beyond its Grade B contour. While there should be such a general stay of all further CATV activity, Midwest believes it would be appropriate for the Commission to provide for an appropirate waiver of the stay in *limited* circumstances upon a special showing by the CATV system of public need for service. However,

he Commission should *not consider* waiving such a tay except in those cases where the CATV system vould serve a "white" area which is presently without any television service. In these cases the Commission should weigh the needs of the community against the possibility that CATV operations might mpair the development of any existing, authorized or applied for local television station—UHF or VHF, ndependent or network-affiliated, commercial or educational—in the area. It should further consider the ikelihood of off-the-air service to the community in question by translators or other low-powered stations.

53. The issue involved here is *not* a matter of making a final, complete disposition with respect to CATV regulation. The issue here is what action is required in order to maintain the orderly growth and development of television broadcasting during the pendency of these proceedings. This is not a situation where television service to the public would be frozen. Quite the contrary, the swift and orderly growth of UHF television will continue vigorously—even more so than if the Commission were to allow CATV to continue to expand "willy nilly" without direction, order, or purpose.

54. The stay rule proposed should become effective immediately upon its publication. It should be made fully effective with respect to (a) all subsequent CATV proposals, (b) all CATV systems which have franchise applications pending, and (c) all CATV systems for which franchises have been granted but which are not in operation. Any CATV system which was in existence prior to April 23, 1965, but which has subsequently expanded its lines or the number of its subscribers or has increased the number of stations carried since that date should be required to modify its operations to the extent necessary to

bring it into conformance with the interim rule. The April 23, 1965, cut-off date is entirely appropriate because that is the date when the Commission issued its *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. [1]5971, where it "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (FCC 65–334, para. 65).

55. It is essential that the interim rule be made applicable to *existing* systems. The interim rule will be totally ineffective in many cities if non-conforming existing systems are allowed to continue to expand or extend their operations, string new cable, increase the number of subscribers, add outside stations, or in any other way expand their facilities or services. The continued expansion of non-conforming systems already constructed or operating can seriously damage existing local television operations, and could well foreclose the development of new UHF station operation forever. San Diego is an example of just such a situation. As previously mentioned, of the eight CATV systems in that area which are franchised four are presently in operation and are rapidly expanding their lines and subscribers.

56. Some of the damage in San Diego and elsewhere had already been done by April 23. But further CATV expansion has been pursued with the greatest vigor since that date, and the damage increases in proportion. And this has occurred in the teeth of the Commission's clear announcement in the Notice. The Commission should make plain that it means what it said. To avert to a useful analogy, the Commission has explained that the congressional policy behind requiring permits to *construct* broadcas

ations was "to discourage applicants [for operating censes] from making large investments and using ich investments as 'improper pressure' on the licens-g authority." *WSAV, Inc.*, Docket Nos. 10517 and 0518, 10 R.R. 402, 403j (1955). In the circum-ances, a rollback to the situation that existed on pril 23, 1965, is singularly appropriate.

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APPENDIX E

Comments of Association of Maximum Service Telecasters, Inc.

DOCKET NO. 15971, FILED JULY 26, 1965

[Excerpts]

(167)

V. The Commission Should by Special Rules Provide Summary Procedures To Handle Requests for Other or Different Treatment Than Provided for in the Rules

109. The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.

110. In its *Notice of Further Proposed Rule Making and Notice of Proposed Rule Making* in Docket Nos. 14895 and 15233, the Commission proposed adoption of specific procedures whereby a party could seek special relief by showing that provisions of the then proposed CATV rules should not apply in the particular circumstances of the case (FCC 63–128, paras. 10–11, and proposed Sections 11.557 and 21.711). However, in its *First Report and Order* the Commission has deleted these proposed provisions, stating:

> The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations. Further, we have

> provided generally for the consideration of re quests for waiver of any rule. (See Sectio 1.3 of the Rules.) (FCC 65–335, para. 155)

However, neither existing procedures under the Ac and the Commission's normal rules relating to ap plications nor the general waiver provision ar adequate.

111. The present procedures for considering ap plications for permits, licenses and other authoriza tions would at the most only be applicable in the cas of applications for microwave authorizations intende to serve CATV systems. Since the Commission ha not asserted any general licensing authority ove CATV systems, these procedures would not be applic able directly to CATV systems themselves and th Commission is proceeding to regulate CATV system directly.

112. Nor does Section 1.3 of the existing rule afford an adequate procedure. This provision relate solely to the waiver of a rule. At best, it is doubtfu that any party other than one to whom a rule is di rected could request such a waiver. Thus, it is ques tionable whether a local broadcast station, for ex ample, could seek the waiver of a rule which require or allowed a CATV system to carry the signal o another station in lieu of its signal. Moreover, eve if it could do so, it is difficult to see how the relie would be adequate since Section 1.3 does not appea to contemplate anything other than a waiver or a *non application* of the rule in question, whereas *affirma tive* relief may be required. For example, the Com mission recognizes that, with respect to its syste of priorities among stations as to carriage and non duplication, it may be necessary to "allow appropri ate" relief upon the basis of a showing by one statio that its signal should be afforded priority of treat

ment by the CATV system over the signals of another tation which provides a calculated signal of equal or ven higher grade (FCC 65–335, paras. 91(c) and 99, . 55).

113. For such reasons, a procedure should be estab- ished by specific rule under which any party affected y the CATV rules could seek an exception or other ppropriate special relief or treatment. We em- hasize, however, that the procedures established for his purpose should require adequate notice to all nterested parties, but should be summary in nature nd should be confined to written submissions by the arties concerned, except where the Commission con- ludes that more is required in any particular situa- ion. Burdensome and time-consuming evidentiary earings on these matters as a matter of course would ot serve the public interest and, moreover, are not ecessary in order to provide effective relief where elief is appropriate.

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